9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914. 1915

No. [redacted] 23

HANOVER STAR MILLING COMPANY, PETITIONER,

vs.

D. D. METCALF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

PETITION FOR WRIT OF CERTIORARI FILED OCTOBER 10, 1913.—CERTIORARI AND RETURN FILED JANUARY 29, 1914.

(23,891)

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1914.

No. 270.

HANOVER STAR MILLING COMPANY, PETITIONER,

vs.

D. D. METCALF.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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a UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Judicial Circuit.

Pleas and Proceedings Had and Done at a Regular Term of the United States Circuit Court of Appeals for the Fifth Circuit, Begun on Thursday, November 21st, A. D. 1913, at New Orleans, Louisiana, Before the Honorable Don. A. Pardee and the Honorable David D. Shelby, Circuit Judges, and the Honorable William B. Sheppard, District Judge.

D. D. METCALF, Appellant,
versus
HANOVER STAR MILLING COMPANY, Appellee.

Be it remembered, that heretofore, to-wit, on the 30th day of January, A. D. 1913, a transcript of the record of the above styled cause, pursuant to an appeal from the District Court of the United States for the Middle District of Alabama, was filed in the office of the Clerk of the said United States Circuit Court of Appeals for the Fifth Circuit, which said transcript was filed and docketed in said Circuit Court of Appeals as No. 2476, as follows:

b *Transcript of Record.*

United States Circuit Court of Appeals, Fifth Circuit.

No. 2476.

D. D. METCALF, Appellant,
versus
HANOVER STAR MILLING COMPANY, Appellee.

Appeal from the District Court of the United States for the Middle District of Alabama.

[Original Record filed January 30, 1913.]
U. S. Circuit Court of Appeals. Filed Mar. 3, 1913. Frank H. Mortimer, clerk.

1

Transcript.

In Equity. No. 178.

HANOVER STAR MILLING COMPANY, a Body Corporate, Organized under the Laws of and a Resident of the State of Illinois, Complainant,

versus

D. D. METCALF, a Citizen of the State of Alabama, Defendant.

In the District Court of the United States for the Middle District of Alabama.

HANOVER STAR MILLING COMPANY, a Body Corporate Organized under the Laws of and a Resident of the State of Illinois, Complainant,

vs.

D. D. METCALF, a Citizen of the State of Alabama, Defendant.

To the Hon. Thos. G. Jones, Judge of said Court, sitting in equity:

Comes your Orator, the Hanover Star Milling Company, a body corporate, and shows unto your Honor the following facts:

1st. Orator is a corporation organized under the laws of the State of Illinois, and a Citizen of that State, and is engaged in the manufacture of flour at Germantown, Illinois.

2 2nd. The defendant D. D. Metcalf is a citizen of the State of Alabama, and of the County of Butler in said State, and is engaged in the business of selling flour at Greenville, Alabama, as will hereafter more fully appear.

3rd. For many years last past, towit, twenty-seven years, Orator has been engaged in the manufacture of a superior and very popular grade of flour to which it has given, and for all of said years sold under, the name of "Tea Rose" flour in a wrapping with distinctive markings, which may be best described by the following cut which is here inserted, towit:

Hanover Star
Milling Co.

Tea Rose
Special Patent
Flour

Germantown, Ill.
Tea Rose.

This flour has been upon the market in Alabama under said name "Tea Rose," and in the distinctive wrappings above shown, for a long period of years last past, towit, twelve years. In this time Orator has through the careful maintenance of a high and uniform quality for said flour, and by expensive advertising and by

diligent work of its representatives, built up for said flour a large and lucrative market and an established and envied reputation until at the present time Orator sells annually in the State of Alabama more than $175,000.00 of such "Tea Rose" flour. And Orator further shows that by reason of the high and well-earned reputation of its "Tea Rose" flour it is enabled to sell other flours of its manufacture to great advantage, and sells great quantities of flours of its manufacture other than "Tea Rose" flour annually in the State of Alabama. And orator further shows that the reputation of "Tea Rose" flour extends and is of very great value to Orator and brings to it a great volume of trade in other States than the State of Alabama, and particularly in the States of Georgia and Florida. And orator further shows that the aforesaid name "Tea Rose" and the distinctive markings upon the wrappings of said flour, as set forth in this paragraph, has, through said long use and diligence in advertising and maintenance of quality,
3 become a valued asset of Orator and its common law Trade-Mark.

4th. Until within a few weeks last past the aforesaid "Tea Rose" flour as made and sold by Orator has been the only flour made and sold, or offered for sale, in Butler County, or in Alabama, under the name of "Tea Rose" flour. Until within the last few weeks the flour manufactured and sold by Orator under the name of "Tea Rose" has represented and stood for that well advertised brand and quality of flour which Orator has so long put upon the market, and for which it has so long marketed. Within the last few weeks a flouring Mill located at Steeleville, Illinois, has, through the agency of the said defendant, D. D. Metcalf, been marketing in Alabama, and particularly in Butler County, Alabama, a flour different from that made by Orator and has been so marketing such flours in packages substantially identical with those used by Orator in marketing its "Tea Rose" flour, and has in the sale of such flour been using the name of "Tea Rose," one of which said packages used by defendant is hereto attached, marked Exhibit A, and made a part of this bill. And the said defendant, D. D. Metcalf, has, and is now by this means deceiving the purchasers of flour of Butler County into the belief that they are buying Orator's article rather than the article manufactured at Steeleville, Illinois. And Orator avers that the use of the name "Tea Rose" and the use of said substantially identical wrappings are intended to, are calculated to, and do in fact deceive the ordinary casual purchaser of flour into the belief that he is purchasing the article marketed under that name by Orator.

5th. The defendant, D. D. Metcalf, in acting as a broker or distributor of the said Steeleville, Illinois, article has been acting with full knowledge of the unfair trade and fraudulent competition involved in placing before the trade the Steeleville, Illinois, article under the name of "Tea Rose," and, although he has been fully notified and warned by Orator that his selling of the Steeleville article under the name of "Tea Rose" is violative of its rights and is unfair competition, has persisted and is now actively engaged in said deceptive use of said name "Tea Rose" and of the wrappings

substantially identical with those in which Orator markets
4 its article of that name. Orator is informed and believes, and upon such information and belief charges the fact to be that the said D. D. Metcalf is falsely and specifically representing and declaring to those persons to whom he attempts to sell the Steeleville article labelled "Tea Rose" that this flour is the original "Tea Rose" flour, and Orator alleges and shows that the said course of dealing by defendant is a guilty infringement of Orator's aforesaid common law Trade-Mark.

6th. Orator further shows that the unfair competition instituted by the Defendant at Greenville threatens great pecuniary loss to orator in that it destroys the prestige of "Tea Rose" flour, as that prestige has been established and earned by Orator, and that it takes from Orator and transfers to its competitors all of the great value which inheres in the reputation and trade built up for "Tea Rose" flour, and that if such unfair competition is continued Orator will lose its highly-valued asset of said common law Trade-Mark and of the reputation and primacy of "Tea Rose" flour to its loss and damage in a sum materially greater than three thousand dollars, and the matter in this controversy exceeds, exclusive of interest and costs the sum or value of three thousand dollars.

Wherefore, the premises considered, Orator prays that this Court take jurisdiction of the cause made by this its original bill of complaint, and that D. D. Metcalf be made a party defendant hereto by issue of the appropriate process of this Court, and that the said defendant Metcalf be forthwith enjoined from the further sale of any flour manufactured by the Steeleville Milling Company, or any person other than Orator of any flour labelled "Tea Rose," and that upon the final hearing of this cause the temporary injunction hereby prayed be made perpetual, and that the Court, by reference, or otherwise, determine the damages sustained by Orator through such unfair sales of said flour as may be made before the said injunction becomes operative, and that a decree be awarded Orator for the amount of damages ascertained. And Orator prays for such other and further relief as it may be entitled to receive, and it will ever pray, etc.

CLARKSON & MORRISETTE AND
HENRY FITTS,
Attorneys for Complainant.

5 FOOTNOTE.—The defendant, D. D. Metcalf, is required to answer each and every paragraph and allegation of the foregoing bill, but not under oath, as sworn answer is hereby waived.

CLARKSON & MORRISETTE, AND
HENRY FITTS,
Attorneys for Complainant.

THE STATE OF ALABAMA,
County of Tuscaloosa:

Before me, the undersigned authority, appeared Harry N. Eddins, who, being duly sworn, deposes and says that he is the General Agent of the Complainant corporation in the State of Alabama

and in other States, and that the facts stated in the foregoing bill are true as therein stated.

HARRY N. EDDINS.

Sworn to and subscribed before me on this the 1st day of March, 1912.

FLEETWOOD RICE,
Notary Public, Tuscaloosa County.

We hereby acknowledge ourselves as security for costs in the above cause.

CLARKSON & MORRISETTE.
J. E. MORRISETTE.

Filed 4th day of Mar., 1912, 10:40 A. M.
HARVEY E. JONES, *Clerk.*

(Below is wording on sack marked "Exhibit A," attached to Bill of Complaint.)

Steeleville
Roller Mills.

(Design of yellow roses with green leaves, the design turned to the left, and consists of one large rose, a half open rose and a small bud, etc.)

Tea Rose.

6 (All lettering below this line is green, and all above the line is red.)

Guaranteed by
Steeleville Milling Co.
under Food & Drugs Act. June 30, 1906.
Serial No. 15304.

Steeleville Milling Co.
Steeleville, Ills.
24 Lbs. Tea Rose Flour

Bemis, St. Louis.

Bond.

Know all men by these presents, that we, the Hanover Star Milling Company, a corporation, Harry N. Eddins, and Fidelity & Deposit Company of Maryland, are held and firmly bound unto D. D. Metcalf in the sum of Five Hundred Dollars, ($500.00) for the payment of which to the said D. D. Metcalf, his heirs, personal representatives and assigns, we bind ourselves, our heirs, successors, assigns and personal representatives, jointly and severally.

Sealed with our Seals and dated this the 4th day of March, 1912.

Whereas, the said Hanover Star Milling Company, a corporation,

has filed its bill of complaint in the above named court, and has obtained thereon an order for the issuance of an injunction from the Honorable Thomas G. Jones, Judge of said Court, to restrain and enjoin the said D. D. Metcalf from the sale of any flour manufactured by the Steelville Milling Company or any person other than orator, of any flour labeled "Tea Rose Flour" and that he be enjoined from the infringement of orator's common law trade mark, and asking for such relief under the general prayer as it might be entitled to;

Now therefore the condition of the above obligation is such, that if the said Hanover Star Milling Company, a corporation, its successors or assigns, or any of them, shall pay or cause to be paid all damages which the said D. D. Metcalf may sustain by the suing out of said injunction if the same is dissolved by said Court, on a bill filed by said Hanover Star Milling Company, a corporation, as aforesaid, then the above obligation to be void, otherwise to remain in full force and effect.

Witness our hands and seals on the day and year first above written.

HANOVER STAR MILLING COMPANY. [L. S.]
By HARRY N. EDDINS, *Gen. Rep.*
HARRY N. EDDINS. [L. S.]
FIDELITY & DEPOSIT CO.
OF MARYLAND, [L. S.]
By W. M. WILLIAMS, [L. S.]
Attorney in Fact.

Attest:
[SEAL.] W. A. SAFFOLD, *Ag't.*

Taken and approved this 4th day of March, 1912.
THOS. G. JONES,
U. S. Judge.

Filed 4 day of Mar., 1912, at 10:45 A. M.
HARVEY E. JONES, *Clerk.*
By ELLEN W. JACKSON, *Deputy.*

Restraining Order.

Whereas in the above-named cause it has been made to appear upon the verified bill of complaint herein, and the exhibits annexed thereto, that writ of injunction preliminary to the final hearing in this cause, is proper, and that prima facie the complainant is entitled thereto enjoining the defendant herein from the acts complained of and threatened to be committed;

Now on motion of the said complainant, it is ordered that the defendant appear before the District Court of the United States, for the Middle District of Alabama, at the Court room of said Court at Montgomery, Alabama, upon the 12th day of March, 1912, at 10 o'clock, A. M., of said day, and then and there show cause, if any it has, why the preliminary injunction therein prayed for should not issue, and it appearing to the undersigned Judge of said Court

that there is danger of irreparable injury being caused to the complainant before the hearing of said application for the preliminary writ of injunction can be heard, unless the said defendant is,
8 pending such hearing, restrained as hereinafter set forth;

Therefore, complainant's application for such restraining order is granted upon its giving bond with two good and sufficient sureties which has been approved by the Court in the penal sum of $500.00 (Five Hundred Dollars), securing the said defendant against all loss, or damages, which may result from the issue of said order if it should be finally determined that the same was improperly issued, or that may be awarded to him by reason of the granting of said order,

Now, therefore, it is ordered that you, the said D. D. Metcalf, defendant herein, your agents, servants and attorneys, and all persons acting by or under your authority or direction be and you are hereby specially restrained and enjoined from the further sale of any flour manufactured by the Steeleville Milling Company, or any person, firm or corporation, other than the Hanover Star Milling Company, of any flour, labeled "Tea Rose," until the further order of this Court.

It is further ordered that a copy of this order, certified under the hand of the clerk and seal of this Court, be served on the defendant, to be restrained thereby.

This the 4th day of March, 1912.

THOS. G. JONES,
U. S. Judge.

Filed 4 day Mar., 1912, 10:45 A. M.
HARVEY E. JONES, *Clerk,*
ELLEN W. JACKSON, *Deputy.*

(Marshall's Return on Restraining Order.

Received in Office, Mar. 4th, 1912.
BANJAMIN E. WALKER,
U. S. Marshal.

Executed by serving a copy of the within writ on D. D. Metcalf, at Greenville, Ala., in Butler County. This the 4th day of March, 1912.

BANJAMIN E. WALKER,
United States Marshal.
By BENJ. W. WALKER, *Deputy.*

* * * * * * *

9 *Petition and Order Continuing.*

Come the parties in the above styled cause by their attorneys, and move the Court for a continuance of the hearing in said cause from Tuesday, March 12th, at 10 o'clock A. M., to Tuesday, March 26, at 12 o'clock noon, and as grounds for said motion show unto the Court the following:

1. Some of the Attorneys for the parties in this cause who are to present this case have conflicting court engagements on March 12th, which will prevent their being present at the hearing at that time.

2. Because of the reason set forth in the first ground hereof, counsel for each of the parties hereto have agreed that the case be continued until Tuesday, March 26th, at 12 o'clock noon, provided such date be satisfactory to the Court.

3. The respondent will not have had sufficient time by March 12th to be ready to make its defence in said cause.

This March 8th, 1912.

HENRY FITTS & CLARKSON AND MORRISETTE,
Attorneys for Complainant.

LANE & LANE,
Attorneys for Respondent.

The above motion coming before the Court for consideration, and the same being considered and understood by the Court, it is ordered that the said motion, be, and the same is hereby granted.

This March 8th, 1912.

THOS. G. JONES,
United States Judge.

Filed 8 day of Mar., 1912, at 4 o'clock P. M.
HARVEY E. JONES, *Clerk.*
By ELLEN W. JACKSON, *Deputy.*

10 *Order on Agreement.*

This being the day set to answer the rule to show cause why a preliminary injunction should not issue herein, came the parties by their solicitors and it is agreed that the matter be submitted upon affidavits filed and to be filed by the parties on or before the 11th day of April, 1912. The parties respectively to serve copies of the affidavits when filed upon the other side and if they so desire to file at that time briefs. All papers to be sent to the Clerk.

Done this 26th March, 1912.

THOS. G. JONES,
U. S. District Judge.

Filed 26 day of March, 1912, at 9:45 A. M.
HARVEY E. JONES, *Clerk.*
By ELLEN W. JACKSON, *Deputy.*

Answer.

To the Honorable Judge of the District Court of the United States for the Northern Division of the Middle District of Alabama:

This defendant, now and at all times hereafter saving and reserving to himself all and every manner of benefit of exception

which can or may be had or taken to the manifold errors, uncertainties, imperfections and insufficiencies in the said bill of Complaint, for answer thereto, or to so much thereof as it is advised is material or necessary to make answer unto, answering says:

I.

The defendant believes it to be true that the complainant is a corporation organized under the laws of the State of Illinois, and a citizen of said State, and is engaged in the manufacture of flour at Germantown, Illinois, but the defendant has no exact knowledge thereof, and calls for strict and exact proof of the same.

II.

11 In answer to the 2nd paragraph of the Bill of Complaint, the defendant admits that he is a citizen of the State of Alabama, County of Butler, in said State, and is engaged in the mercantile business at Greenville, Ala.

III.

This defendant, in answer to the 3rd Par. of the Bill of Complaint, alleges that he has no knowledge of information as to whether or not the said complainant has for the last twenty-seven years (27) been engaged in teh manufacture of a superior and very popular grade of flour to which it has given, and for all of said years sold under the name of Tea Rose in a wrapping with distinctive markings, as set forth in said Bill, or that said flour under said name Tea Rose in the distinctive markings set forth has been upon the market in Alabama for the past twelve years, and therefore denies the same and asks the Court to require the complainant to make strict proof of the statement contained in said paragraph.

In further answer to the 3rd Par. defendant says he has no knowledge or information as to the sums of money said complainant has spent, or whether it has spent any sum in developing its flour under the name Tea Rose, as set forth in the Bill, or whether it has built up a large and profitable business under said name, or whether or not the said Tea Rose flour has a high and well earned reputation, built up by the complainant, or whether it is of great value to the complainant, or as to whether or not it brings a great volume of trade in the State of Alabama, or any State, or as to whether or not it is a valuable asset to complainant, and therefore denies the same.

IV.

In answer to the 4th Par. defendant denies, upon information and belief, that the complainant's Tea Rose flour is the only Tea Rose flour that has been sold or offered for sale in Alabama, under the name Tea Rose, but is informed and believes that as early as 1899 the Steelville Milling Company sold flour in Alabama labeled Tea Rose, and having the same specific design as Exhibit A.

Further answering the 4th par. defendant says that he has been

handling a car load of flour manufactured and sold to him by the Steeleville Milling Company, of Steeleville, Illinois, (but not
12 as an agent of said Steelville Milling Company) which flour is marketed in sacks and barrels having printed or stenciled thereon the name "Tea Rose" substantially as disclosed in Exhibit A, said sacks and barrels also having stamped or printed thereon words and figures as follows:

Steelville
Roller Mills

Tea Rose
Guaranteed by
Steelville Milling Co.
Under Food & Drug Act. June 30.

Serial No. 15304.

Steelville Milling Co.
Steeleville, Ill.

that the name of the manufacturer (Steelville Milling Company) of the Tea Rose flour which he has sold appears distinctly on the Tea Rose flour handled by him.

Further answering this said 4th Par. this defendant says he has never deceived nor attempted to deceive, nor ever intended by any means, to deceive, any purchasers of flour of Butler County, Alabama, or purchasers of any other place, into the belief that they were buying complainant's flour. Your orator further says that all the Tea Rose flour he has ever sold or attempted to sell was the Tea Rose flour of the Steelville Milling Company, of Steelville, Illinois, and was so represented by him as such to purchasers thereof.

Further answering said 4th Par. defendant denies that he has ever attempted in any manner to palm off or sell, or lead or attempt to lead any purchaser to believe, that he was selling, or offering to sell any other flour except the Tea Rose flour manufactured by the Steeleville Milling Company, of Steeleville, Illinois, and denies that any purchaser has ever been deceived, or that he ever attempted or intended to deceive any one into the belief that he was buying complainant's Tea Rose flour.

V.

In answer to the 5th Par. defendant says that he is in the mercantile business in Greenville, Alabama, and purchased a few weeks ago a car-load of flour manufactured by and sold and de-
13 livered to him by the Steeleville Milling Company, of Steeleville, Illinois; that not until after he had purchased and received said car-load of flour, and had sold and delivered forty barrels thereof, was he aware or had notice that complainant claimed any exclusive right in the name of Tea Rose as a trade-mark or trade-name for flour, and was never informed of any alleged infringement until after he had received said car-load of flour and had paid for the same.

In further answering said paragraph, defendant denies that he has ever falsely, specifically or otherwise, represented to or declared to any purchaser, or prospective purchaser, that the flour sold or attempted to be sold by him was the product of complainant's mill, or that it was the original Tea Rose flour, but in all sales and transactions by him the flour was sold as a flour manuactured by, and the product of, the Steeleville Milling Company, of Steeleville, Illinois, the name of which manufacturer clearly appears on each and every sack and barrel of flour sold by him, as the same is shown by Exhibit A to the Bill of Complaint in this cause.

VI.

In answer to the 6th Par. defendant denies that he has ever unfairly competed with complainant at Greenville, Alabama, or at any other place, in the sale of Tea Rose or any other flour or product; denies that any act of his threatens a great, or any, pecuniary loss, or damage, or has ever caused any loss or damage to complainant; denies that any act of his has ever, in any manner, caused any loss or damage to the complainant in selling flour manufactured by the Steeleville Milling Company, of Steeleville, Illinois.

VII.

Further answering the Bill of Complaint, defendant says his competition has been fair, lawful and equitable, and that he has never infringed on any lawful rights of complainant, and denies, upon information and belief, that complainant has any exclusive right in or to the words Tea Rose as a Trade-mark for flour, or in and to the distinctive markings set forth in said Bill.

VIII.

14 Further answering, defendant says, on information and belief, that long prior to twenty-seven years ago, the date of first use by complainant as alleged in said Bill, and as early as 1872, the name Tea Rose had been adopted, appropriated and used as a trade-mark for flour by the firm of Allen & Wheeler, of Troy, Ohio, and has been used by it and its successors, the Allen & Wheeler Company, continuously, as a trade-mark for flour, and is now used by the said Allen & Wheeler Company.

IX.

Further answering, defendant says, on information and belief, that the complainant company is not lawfully entitled to the sole and exclusive use and benefit of the words "Tea Rose as a trade-mark or brand for flour, in that the said complainant was not the first appropriator or user thereof, and that it has no exclusive rights therein or thereto.

X

Further answering, defendant says, on information and belief that the complainant company is not lawfully entitled to the sole and exclusive use and benefit of the picture of a rose as a trade-mark or brand for flour, in that said complainant was not the first appropriator or user thereof, and that it has no exclusive rights therein or thereto; that the picture of a rose as a trade-mark for flour has been continuously used since 1880, by the Acme-Evans Milling Company, of Indianapolis, Indiana, and its predecessors, the Acme Milling Company.

XI.

Further answering said Bill of Complaint, defendant says, on information and belief, that the trade-mark or brand on the flour purchased by him from the Steeleville Milling Company, of Steeleville, Illinois, has been in use by the said Steeleville Milling Company for more than sixteen (16) years last past, and for more than six (6) years last past knowingly to the complainant herein.

XII.

This defendant, further answering said Bill, denies that the complainant has suffered by the acts of this defendant loss or damage in a sum materially greater than Three Thousand Dollars, or any other sum, and that said complainant has been done any wrong by this defendant, or is entitled to any relief in the premises.

The defendant, having fully answered the Bill of Complaint, and each and every allegation and statement thereof which he is advised is material, humbly prays to be hence dismissed with his reasonable costs and charges in this behalf most wrongfully sustained.

D. D. METCALF, *Defendant.*
EDWARD E. LONGAN,
LANE & LANE,
C. F. WINKLER,
Attorneys for Defendant.

THE STATE OF ALABAMA,
Butler County:

Before me, J. H. Steiner, a Notary Public in and for said State and County, personally appeared D. D. Metcalf, the above named defendant, who, being by me duly and legally sworn, on oath says that the facts and matters stated in his foregoing answer, when stated upon his knowledge are true, as therein stated, and when stated upon his information and belief, he believes to be true.

D. D. METCALF.

Subscribed and sworn to before me, on this the 25th day of March, 1912.

J. H. STEINER,
Notary Public.

[SEAL.]

Filed 26 day of March, 1912, at 4:30 o'clock P. M.

HARVEY E. JONES, *Clerk*,
By HARRY PORTER, *Deputy*

16 *Affidavit of Herman E. Gilster.*

And now comes Herman E. Gilster, who being duly sworn on his oath states that he is now, and has been for the last twenty-five years and more, a resident of the City of Chester, County of Randolph and State of Illinois, and that during the year 1906, and for some time prior thereto, he was secretary of the Steeleville Milling Company located at Steeleville, Randolph County, Illinois, that said Milling Company was then and is now under the management of Albert H. Gilster. That among other brands of flour manufactured and marketed by the said Steeleville Milling Company during the year 1906 and for several years prior thereto, the said Steeleville Milling Company was manufacturing and selling a certain brand of flour known and designated as the Tea Rose brand of which Defendant's Ex. No. 1 is a true copy, for which they had many customers in the South, particularly in the State of Mississippi; that during said year 1905 one of our customers located at Meridian, Mississippi, complained to the affiant that the Hanover Star Milling Company, the plaintiffs in this suit, was at that time through some of its distributors and local agents in the State of Mississippi marketing and selling a brand of flour known as the Tea Rose Brand, which was alleged to have been manufactured and distributed and marketed in the said state of Mississippi and elsewhere as the Tea Rose Brand, and that complaint was made by local dealers in Mississippi to the Steeleville Milling Company of the fact that the Tea Rose Brand of Flour so made and distributed by the Hanover Star Milling Company through its local agents at Meridian, Mississippi, and other points was an inferior quality of flour and was being sold at a lower price than the Tea Rose Brand of flour manufactured and sold by the Steeleville Milling Company.

Affiant further says that some time during the spring of the year 1906 he visited the proprietors and owners of the Hanover Star Milling Company at Germantown, Illinois, the complainants herein, who were then manufacturing and distributing to other customers in the State of Mississippi their flour branded as the Tea Rose Brand with a view of ascertaining the respective rights of the said Steeleville Milling Co., and the said Hanover Star Milling Company

17 to the use of the said Tea Rose Brand of Flour, as disclosed by Exhibit No. 1, the product of their mills, and for the purpose of ascertaining if possible the length of time the said Hanover Star Milling Company had been using the said Tea Rose Brand, and marketing the same. Affiant further says that on this occasion he spoke to Henry Sherman and his son Edward Sherman, the proprietors and managers of the said Hanover Star Milling Company with reference to the right of the Steeleville Milling

Company to the use of the name Tea Rose and the pictorial design as disclosed by Exhibit No. 1, on their flour, and of the fact of this complaint of the said Milling Company manufacturing and selling an inferior grade of flour and at a lower price as herein above recited, and that the said Shermans were then unable to or failed to furnish the affiant with the exact date showing the length of time in which they had been using the said Tea Rose Brand on their flour, and then and there made no objection to the use of the Tea Rose as disclosed by Exhibit No. 1, on any of the flour then manufactured or thereafter to be manufactured and sold to its customers by the said Steeleville Milling Company.

Affiant further says that he plainly informed the said Shermans at that time and in that conversation that the Steeleville Milling Company had been using and marketing a flour known as the Tea Rose Brand, as per Exhibit No. 1, of the Defendants hereto attached, and would continue to do so, and that neither of the said Shermans made any objection to this being done, and made no request upon affiant to desist from the use thereof.

Affiant further says that the said Steeleville Milling Company has ever since that time and for a long time prior thereto, used the Tea Rose Brand, as per Exhibit No. 1, for their flour, and has marketed the same in the State of Alabama and State of Mississippi, and their other customers in different states without objection or remonstrance of any kind on the part of the said Hanover Star Milling Company, or the proprietors thereof.

HERMAN E. GILSTER.

Subscribed and sworn to before me this 19th day of March, 1912.

[SEAL.] W. GEO. BEEVER,
Circuit Clerk.

18 Filed March 26, 1912, at 4:30 P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

(Below is wording shown on "Defendant's Exhibit No. 1, attached to affidavit of Herman E. Gilster.)

"Defendant's Exhibit No. 1," heretofore copied at page 5 as Exhibit "A."

* * * * * * *

Affidavit of Albert H. Gilster.

STATE OF MISSOURI,
City of St. Louis, ss:

Albert H. Gilster, being duly sworn, deposes and says that he is the President of the Steeleville Milling Company, Flour Manufacturers, of Steeleville, County of Randolph and State of Illinois; that his said corporation has been using the trademark or brand Tea Rose, as shown in Defendant's Exhibit No. 1, hereto attached,

for over sixteen (16) years, to-wit, since June 29th, 1895; that flour made by his said corporation and bearing said trade-mark or brand has been sold by said corporation in Illinois, Tennessee, Mississippi, Louisiana, Arkansas, and in Alabama, the sales of said flour bearing said trade-mark in Alabama being in the year 1899, and in the month of August the said sale and delivery of said flour being made to I. H. Pringle, at Whistler, Alabama; that flour bearing said trade-mark Tea Rose, as per "Defendant's Exhibit No. 1," has been sold by his company, (Steeleville Milling Company, of Steeleville, Illinois), in the State of Mississippi, and in Meridian, Mississippi, for over twelve years; that he is personally acquainted with some of the Officers of the Hanover Star Milling Company, the complainant herein, located at Germantown, County of Clinton and State of Illinois; that the mill of the Hanover-Star Milling Company is located about seventy-five miles from his Company's mill at Steeleville, Illinois; that his Company, the Steeleville Milling Company, and the Hanover Star Milling Company, have been business rivals for over sixteen years (16); that about thirteen (13) years
19 ago his company, the Steeleville Milling Company, marketed and sold through C. C. Johnson, in Meridan, Miss., flour bearing the Tea Rose Brand as per "Defendant's Exhibit No. 1," and has built up by extensive advertising in Meridan, Mississippi, and vicinity, in the year 1901, a valuable trade on the Tea Rose Brand of flour, Winner & Meyer being the distributors at that point; that as early as the year 1901, the sales his Company made were at least on an average of six or seven hundred barrels of flour per month through the said Winner & Meyer, which flour bore the trade-mark as per "Defendant's Exhibit No. 1"; that after his company had built up a valuable trade for Tea Rose flour through said Winner & Meyer, at Meridian, Mississippi, the said firm of Winner & Meyer dissolved and the said Hanover Star Milling Co., the Complainant herein, entered said territory with a Tea Rose Brand of flour substantially identical with "Defendant's Exhibit No. 1," and the Hanover Star Milling Co. distributed its Tea Rose brand of flour through Meyer Bros., one of the successors of Winner & Meyer; that when the said Hanover Star Milling Company entered this territory in order to obtain the trade which the Steeleville Milling Company had in said territory, the said Hanover Star Milling Company sold its Tea Rose brand of flour at a lower price, and the consequences thereof were that the trade on Tea Rose flour which had been built up at this place by the Steeleville Milling Company was undermined by the Hanover Star Milling Company, on account of its selling a cheaper grade of Tea Rose flour at a lower price than the Steeleville Milling Company's Tea Rose Brand; that as early as 1904 the Steeleville Milling Company and the Hanover Star Milling Company, the complainant herein, were active competitors in the Meridan Market in the sale of Tea Rose flour, marketing their respective makes of Tea Rose flour practically through the same distributors; deponent further says that in 1904, or not later than 1905, he, as President of the Steeleville Milling Company, notified the Hanover Star Milling Company, the com-

plainant herein, that it, the Hanover Star Milling Company, was infringing on its Tea Rose brand of flour, "Defendant's Exhibit No. 1," and that in reply the Hanover Star Milling Company wrote a rather indefinite letter to the Steeleville Milling Company,
20 and that after that time and not later than 1905, he addressed another letter to the Hanover Star Milling Company in order to find out who was entitled to the brand, and to which last letter he never received any reply; although written at least seven years ago; deponent further says that in August, 1905, he caused notice to be sent to the Hanover Star Milling Company, the complainanf herein, and on August 24th, the Millers' National Federation, through its Secretary, addressed the following letter to the Hanover Star Milling Company:

"August 24, 1905.

"Hanover Star Milling Co., Germantown, Ill.

"GENTLEMEN: I am advised by one of our good members that you are infringing their flour brand 'Tea Rose.'

"As you know, it is a part of the policy of the Millers' National Federation to prevent, as far as possible, the innocent infringement of members' brands, settling such controversies without recourse to law or other disagreeable and expensive features wherever possible to do so; and in order to further pursue investigation of this matter, will you kindly advise me at your early convenience when you first started using the brand 'Tea Rose,' to the end that we may determine whether or not an infringement exists.

"Thanking you in advance for the courtesy of an early reply, I am

"Respectfully,

"SECRETARY."

and in the same month, in reply to said letter, his Company received the following communication from the Millers' National Federation:

"CHICAGO, Aug. 31, 1905.

"Steeleville Milling Co., Steeleville, Ill.

"GENTLEMEN: I have before me letter of the Hanover Star Milling Co., under date of August 26th, wherein they state that they have been using 'Tea Rose' brand of flour since approximately 1885.

21 "I shall be glad if you will advise me if you adopted and used this brand before this time, which is the only basis on which common law right would give you an exclusive right to its use over that of the Hanover Star Milling Co. The latter have not furnished affidavits on this matter, but state they are in position to do so.

"Respectfully,

(Signed) "A. L. GOETZMANN,

"Secretary."

Deponent further says that in the year 1906, as per the affidavit filed herein, Herman E. Gilster, in person took up with the Hanover Star Milling Company, the complainant herein, and discussed with *them* the respective rights of the Steeleville Milling Company and the Hanover Star Milling Company to the Tea Rose Brand of flour, as per "Defendant's Exhibit No. 1."

Defendant further says that in 1906, a short while after the visit of Herman E. Gilster to the Hanover Star Milling Company, he, the said deponent, at a Millers' Convention at Sparta, Illinois, attempted to come to some understanding with Henry Schuermann, the President of the Hanover Star Milling Company, regarding the respective rights of the Steeleville Milling Co. and the Hanover Star Milling Company to the use of the brand Tea Rose.

Deponent further says that the Hanover Star Milling Company, although knowing for seven years that the Steeleville Milling Company was making and marketing flour under the Tea Rose brand, as per "Defendant's Exhibit No. 1," never entered any objection or protest to his Company's using said Tea Rose brand of flour until the institution of this suit;

Deponent further says that the flour which the defendant herein is selling was manufactured by the Steeleville Milling Company and put up in sacks and barrels bearing therein the Tea Rose brand, as per "Defendant's Exhibit No. 1," which the said Steeleville Milling Co. has used for over sixteen years, and of which the complainant herein, the Hanover Star Milling Company, has had notice for at least seven years and *have* never heretofore raised any objections or any protest to the use of said trade-mark by deponent's said company.

ALBERT H. GILSTERN.

22 Subscribed and sworn to before me this 21st day of March, 1912.

My commission expires June 9th, 1913.

[SEAL.] ELSIE L. WALLACE,
Notary Public.

Filed 26th day of March, 1912, at 4:30 P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

(Below is wording shown on sack marked "Defendant's Exhibit No. 1," attached to Affidavit of Albert H. Gilster).

Wording shown on sack marked "Defendant's Exhibit No. 1," heretofore copied at page 5 as Exhibit "A."

* * * * * * *

Affidavit of D. D. Metcalf.

D. D. Metcalf, the Defendant in the above stated cause, being by me first duly sworn, on oath says that he is financially able and

responsible for the payment of all loss and damages the Complainant in the above stated cause may sustain, should it be successful in the prosecution of this case.

D. D. METCALF.

Subscribed and sworn to before me, on this, the 25th day of March, 1912.

J. H. STEINER,
Notary Public.

Filed 26th day of March, 1912, at 4:30 o'clock P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

23 *Affidavit of Hubert H. May.*

THE STATE OF ALABAMA,
Butler County:

Hubert H. May, being first duly sworn, depose and says that he is the traveling salesman for D. D. Metcalf, the Defendant herein; that he has sold for the Defendant herein forty barrels of "Tea Rose" flour; that in all sales made by him of said flour, it was sold by him as "Tea Rose" made by the Steeleville Milling Company of Steeleville, Illinois; that in no case has he ever represented that this flour was the product of Complainant, but that, to the contrary, he has always represented that this flour was the product of the Steeleville Milling Company, of Steeleville, Illinois.

HUBERT H. MAY.

Subscribed and sworn to before me this, the 25th day of March, 1912.

[SEAL.] J. H. STEINER,
Notary Public.

Filed 26th day of March, 1912, at 4:30 P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of Alois Baumgartner.

STATE OF ILLINOIS,
County of Randolph, ss:

Alois Baumgartner, being first duly sworn, on oath deposes and says, that he is a resident of the Village of Steeleville, County of Randolph and State of Illinois, that he was from July, 1907, to February, 1909, in the employ of the Hanover Star Milling Company, of Germantown, Illinois, as second miller; that while in the employ of said company, the said company at times packed into sacks bearing the brand "Tea Rose," a grade of flour commonly

called "extra fancy" and that at other times the said com-
4 pany packed into sacks bearing the same "Tea Rose" brand a grade of flour commonly called "straight run" or "100 er cent" flour.

[SEAL.] ALOIS BAUMGARTNER.

Personally appeared before me, a Notary Public in and for said County, in the State aforesaid, Alois Baumgartner, known to be the person he represents himself to be, who, being duly *subscribed and* sworn, on oath deposes and says, that the above affidavit is true and correct, to the best of his knowledge and belief.

Given under my hand and notarial seal this 20th day of March, A. D. 1912.

[SEAL.] PRENTISS S. WILSON,
Notary Public.

My Commission expires June 24, 1915.
Filed 26th day of March, 1912, at 4:30 o'clock A. M.

HARVEY E. JONES, *Clerk.*
By HARRY PORTER, *Deputy.*

Affidavit of Thomas B. Wheeler.

STATE OF OHIO,
County of Miami, ss:

On this 9th day of March, 1912, A. D., personally appeared before me, Thos. B. Wheeler, who being by me first duly sworn, deposes and says that he is a resident of the City of Troy, County of Miami, and State of Ohio, and has been for the past forty-five years; that he is now, and has been engaged in the milling business and is at present the President of The Allen & Wheeler Company, and that prior to the organization of said Company in 1904 he was a member of the co-partnership of Allen & Wheeler from 1866 until the organization of the Company; that the said co-partnership was engaged in the manufacture and sale of flour and that the business has been continued by the said Company; that in the year 1872, or prior thereto, the said co-partnership adopted for its use and commenced to use as a trade-mark for flour the words "Tea Rose"; (label as at present used appears on a sack hereto attached); that in the year 1872 the Company sold flour under this brand, and the books bear charges as follows: Mar. 29, 1872, 25 barrels
25 Tea Rose to A. S. Wrenn & Son, Cincinnati, Ohio; April 18th, 1872, 25 barrels Tea Rose to A. S. Wrenn & Sons, Cincinnati, Ohio; May 3rd, 1872, 25 barrels of Tea Rose to A. S. Wrenn & Sons, Cincinnati, Ohio; Aug. 12, 1872, 100 barrels Tea Rose to S. Lindsey, Jr., & Co., Pittsburg, Pa.; that the firm of A. S. Wrenn & Sons was succeeded by Thos. A. Wrenn, now of New York, present address being E-16 Prod. Exchange; that in the early '70's Schomaker & Co., of Pittsburg, were also customers for this brand of Tea Rose; that in the later '70's Wright & Whitcomb, of Boston, Mass., succeeded by L. A. Wright & Co., were also customers for this

brand of Tea Rose; that since The Allen & Wheeler Co. appropriated and adopted said brand, Tea Rose, for flour it has used same continuously down to the present time.

[SEAL.] THOMAS B. WHEELER.

Subscribed to before me this 9th day of March, 1912.

F. A. FINCHER,
Notary Public, Miami County, Ohio.

My Commission expires July 13, 1914.

Filed March 26th, 1912.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

(Below is wording on sack attached to Affidavit of Thos. B. Wheeler.)

Tea Rose
Roller process
Family Flour.
From Choice
Winter Wheat.
Allen & Wheeler.

(The above wording is shown in a circle, with the words above "Family Flour" written in blue, "Family Flour" in red, and below in green.)

Bemis Indianapolis Bag Co.

Tea Rose.

(The above wording "Tea Rose," shown at the bottom of the bag is in green.)

26 *Affidavit of Harvey Mullins.*

Harvey Mullins, being duly sworn, deposes and says that he is the Vice-President of the Acme Evans Company, a corporation organized and doing business under the laws of the State of Indiana, that said Company succeeded the Acme Milling Company in the manufacture and selling of wheat flour. That one of the trade marks used for flour by said Acme-Evans Company is White Rose with a picture of a Rose; that said trade mark has been used continuously by said Acme-Evans Company and its predecessors since January first, 1858, and the picture of a Rose has been continuously in the trade mark since the year 1880. The said Acme-Evans Company expect to continue the use of said trade mark which is more particularly shown and described by Exhibit 2, which is hereto attached.

HARVEY MULLINS.

Subscribed and sworn to before me this twentieth day of March, 1912.

FRED F. FISTERER,
Notary Public.

Filed 26th day of March, 1912, at 4:30 P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

(The wording on Exhibit 2, attached to Affidavit of Harvey Mullins is as follows:)

Acme Milling Co.
Acme

(Design of a rose in center.)
(Design of four wheat stalks to right of rose.)

White Rose.
Flour
Indianapolis, Ind.
Guaranteed under the Pure Food and Drug Act of June 30, 1906.
Serial No. 12819.

(The wording Acme Milling Co. and White Rose shown in red and blue ribbon respectively.)

27 *Affidavit of Albert H. Gilster.*

STATE OF MISSOURI,
City of St. Louis, ss:

Albert H. Gilster, being first duly sworn, deposes and says that he is the President of the Steeleville Milling Company, of Steeleville, Illinois; that he has examined a copy of the Bill of Complaint filed against his customer, D. D. Metcalf, of Greenville, Alabama; that since examining the copy of said Bill of Complaint he has visited a number of the Bag Houses in St. Louis, and has written to Morgan & Hamilton, Bag Manufacturers, of Nashville, Tennessee, and from all the information which he has been able to obtain, orally or by examination of the records, says, upon information and belief, that the Hanover Star Milling Company, the complainant in the above suit, has not used the Tea Rose brand, as designated and alleged in complainant's Bill prior to the year 1902 in the United States or domestic market, and as to its use in foreign markets, affiant was unable to obtain any definite information.

ALBERT H. GILSTER.

On this 21st day of March, 1912, before me personally appeared Albert H. Gilster, to me known to be the person described in and who executed the foregoing instrument, and acknowledged that the

same is correct and true to the best of his knowledge, information and belief.

My Commission expires June 9th, 1913.

ELSIE L. WALLACE,
Notary Public.

Filed 26th day of March, 1912, at 4:30 P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

28 *Affidavit of Henry M. Allen.*

On the 9th day of March, A. D. 1912, personally appeared before me, Henry M. Allen, who, being by me first duly sworn, deposes and says that he is a resident of the city of Troy, County of Miami and State of Ohio, and that he is now, and has been engaged in the milling business; that he has since 1904 been a Vice-President and the General Manager of The Allen & Wheeler Co., and that prior thereto since 1878 he was connected with, or a co-partner in the partnership of Allen & Wheeler; that said co-partnership was engaged in the manufacture and sale of flour, and that the business has been continued by the said Company; that in the year 1872, or prior thereto, the said copartnership adopted for its use and commenced to use as a trademark for flour the words "Tea Rose." (Label as at present used appears on a sack hereto attached.) That in the year 1872 the Company sold flour under this brand, and the books bear charges as follows: Mar. 29, 1872, 25 barrels Tea Rose to A. S. Wrenn & Son, Cincinnati, Ohio; Apr. 18, 1872, 25 barrels Tea Rose to A. S. Wrenn & Sons, Cincinnati, Ohio; May 3, 1872, 25 barrels Tea Rose to A. S. Wrenn & Sons, Cincinnati, Ohio; Aug. 12, 1872, 100 barrels Tea Rose to S. Lindsey, Jr., & Co., Pittsburgh, Pa.; that the firm of A. S. Wrenn & Sons was succeeded by Thos. A. Wrenn, now of New York, present address being E-16 Produce Exchange; that in the early '70s Schomaker & Co., of Pittsburgh, Pa., were also customers for this brand Tea Rose; that in the later '70s Wright & Whitcomb, of Boston, Mass., succeeded by L. A. Wright & Co., were also customers for this brand of Tea Rose; that since The Allen & Wheeler Co. appropriated and adopted said brand, Tea Rose, for flour, it has used same continuously down to the present time.

HENRY M. ALLEN.

Subscribed before me this 9th day of March, 1912.

[SEAL.] F. A. FISCHER,
Notary Public, Miami County, Ohio.

My Commission expires July 13, 1914.

Filed 26th day of March, 1912, at 4:30 P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

29 (The following wording appears on sack attached to Affidavit of Henry M. Allen):

Wording on sack heretofore copied at page 25.

* * * * * * *

Affidavit of F. A. Stahlberg.

STATE OF ILLINOIS,
County of Randolph, ss:

F. A. Stahlberg, being duly subscribed and sworn, on oath deposes and says, that he is a resident of the Village of Steeleville, in the County of Randolph, and State of Illinois, that in the year 1895 A. D. he was treasurer of the Steelville Company, a corporation organized under the laws of the State of Illinois, and that in said year the said Steelville Milling Company packed and sold flour under the brand "Tea Rose"; that he was connected with the Steeleville Milling Company until May 1897, and that during that time the said Steeleville Milling Company continued to pack and sell flour under the brand "Tea Rose" and that the said "Tea Rose" brand is identical with the "Tea Rose" brand used at the present time by the Steeleville Milling Company.

F. A. STAHLBERG. [SEAL.]

I, Prentiss S. Wilson, a Notary Public in and for said County, in the State aforesaid, hereby certify that F. A. Stahlberg, personally known to me to be the person he represents himself to be, appeared before me this day in person and subscribed the foregoing affidavit, and made solemn oath that the statements therein made by him are true and correct to the best of his knowledge and belief.

Witness my hand and notarial seal this 30th day of March A. D. 1912.

[SEAL.] PRENTISS S. WILSON, [SEAL.]
Notary Public.

My Commission expires June 24, 1915.

30 Received by mail and filed 5th day of April, 1912, at 1 o'clock P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of William Murdock.

STATE OF MISSOURI,
City of St. Louis, ss:

William Murdock, being by me first duly sworn, on oath says that he is a resident of the City of St. Louis and State of Missouri, and has been for the past thirty (30) years; that he is now employed in the capacity of Department Manager by the H. & L. Chase Bag

Company, of Saint Louis, Missouri, and has been for the past twenty-five (25) years employed by said Company; that he is familiar with the books and records showing proofs of the designs and trade-marks which his Company prints for its customers; that his said company has only one book in its possession disclosing the designs of trade-marks and brands of the Steeleville Milling Company, of Steeleville, Illinois, and the Hanover Star Milling Company, of Germantown, Illinois; that the said book contains the Tea Rose brand or trade-mark which his said Company prints for the Steeleville Milling Company, and the Tea Rose brand which his Company prints for the Hanover Star Milling Company; that he reecntly examined said book, and that there appears on page 2272 of said book the proofs of the Tea Rose brand of the Steeleville Milling Company and in one column thereof the date of order, 1895, from the Steeleville Milling Company, and on pages 2304-5 of said book appears the Tea Rose brand or mark of the Hanover Star Milling Company and in one column thereof the date of order 1898, from the Hanover Star Milling Company; that the photographs hereto attached are true and correct representations or reproductions of the pages aforesaid appearing in said book; that the Rose design appearing on the Steeleville Milling Company's sacks or bags, and also the sacks or bags of the Hanover Star Milling Company, were both printed from the same cut, No. 1401.

WILLIAM MURDOCK.

31 Subscribed and sworn to before me this 6th day of April, 1912.

My commission expires June 9th, 1913.

ELSIE L. WALLACE,
Notary Public.

Received by mail and filed 8th day of April, 1912, at 9 o'clock A. M.

HARVEY E. JONES, *Clerk*,
By HARRY PORTER, *Deputy.*

Affidavit of Winkelmann.

STATE OF ILLINOIS,
County of Randolph, ss:

William J. Winkelmann, being duly subscribed and sworn, on oath deposes and says: That he is a resident of the Village of Steeleville, County of Randolph and State of Illinois; that in the month of July, 1895, he was employed by the Steeleville Milling Company, of said Village of Steeleville, as engineer; that he continued in their employ for more than one year, and that during the period of his employment the said Steeleville Milling Company packed, sold and shipped out flour under the brand "Tea Rose," and that the brand "Tea Rose" used at that time is the identical brand "Tea Rose" now being used by said Steeleville Milling Company.

WM. J. WINKELMANN. [SEAL.]

Personally appeared before me, a Notary Public in and for said County, in the State aforesaid, William J. Winkelmann, personally known to me to be the person he represents himself to be, who being duly subscribed and sworn, on oath says that the affidavit above subscribed to is true and correct, to the best of his knowledge and belief.

[SEAL.] PRENTISS S. WILSON, [SEAL.]
Notary Public.

My Commission expires June 24, 1915.

Received by mail and filed 10th day of April, 1912, at 9 A. M.

HARVEY E. JONES, *Clerk.*
By HARRY PORTER, *Deputy.*

32 *Affidavit of James M. Pillers.*

STATE OF MISSOURI,
City of St. Louis, ss:

James M. Pillers, being duly sworn, deposes and says that he is a resident of Pinckneyville, County of Perry and State of Illinois; that in the year 1895 he was Secretary and Office Man of the Steeleville Milling Company, of Steeleville, Illinois, and that he is now traveling salesman for said Company; that one of the brands of flour in use by the Steeleville Milling Company at that time was the Tea Rose brand and the design of a rose specifically as shown in Defendant's Exhibit No. 1, attached to the affidavit of Albert H. Gilster; that in 1895 he placed for the Steeleville Milling Company an order for flour sacks having printed thereon the words Tea Rose and the design of a rose as shown by said exhibit with a traveling man of the H. & L. Chase Bar Company of Saint Louis, Missouri, that prior to the placing of said order for said sacks with said brand printed thereon, the said salesman of the H. & L. Chase Bag Company informed him that it was a brand not then in use by any mill in or around Saint Louis, Missouri, and that upon said salesman's assurance that said brand was not then in use by any mill in and around Saint Louis he then placed an order for said sacks in May or June, 1895; that while he was connected with the Steeleville Milling Company in 1895 he remembers distinctly of selling flour in sacks printed with the specific design as shown in Defendant's Exhibit No. 1, attached to the affidavit of Albert H. Gilster, to Dr. Thomas Robertson and Mrs. Mary Keller, of Steeleville, Illinois; that he is personally acquainted with Harry N. Eddins, the General Sales Agent of the Hanover Star Milling Company, and that at a recent interview with the said Eddins in his office at Tuscaloosa, Alabama, the said Eddins informed him that he knew that the Steeleville Milling Company was marketing the Tea Rose brand of flour in the State of Mississippi about seven or eight years ago.

JAMES M. PILLERS.

Subscribed and sworn to before me this 8th day of April, 1912.

[SEAL.] ELSIE L. WALLACE,
Notary Public.

Received by mail and filed 10th day of April, 1912, at 9 o'clock A. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

33 *Affidavit of H. N. Eddins.*

Before the undersigned authority personally appeared Harry N. Eddins, who being first duly sworn, deposes and says: Affiant resides at Tuscaloosa, Alabama; is thirty-four years old and has for seven years and more been the General Sales Representative of the complainant company and has had charge of the advertising of its products. When affiant first entered the employment of the complainant company he found that it was using and had established a trade for a brand of its flour under the name of Tea Rose, and in a package identical with that shown as Exhibit "A" to the affidavit of Henry Schurman filed in this cause. This Tea Rose Flour is now of the same quality and standard as the flour sold under that name at the beginning of affiant's connection with the complainant. It is a quality well suited for general consumption. Soon after affiant's employment he decided to make this flour the basis of his advertising efforts, and of his price making, and began a vigorous and expensive campaign of advertising of Tea Rose flour, and during the past seven years has spent many thousands of dollars in advertising this name and brand of flour, as the production of the complainant mill. During all of that time he has subordinated the notoriety of numerous other brands of flour made by the complainant, and in quoting flour prices to his customers has adopted the uniform policy of making Tea Rose the basis of the quotations, quoting other brands as so much above or so much below the Tea Rose price. In this campaign of advertising affiant has distributed throughout a territory, which he early adopted as the one in which he would build up a trade, viz., Eastern and Northeastern Mississippi; all of Alabama, Western Georgia and Northern Florida. Much money has been spent by complainant under affiant's direction in newspaper advertising; in large expensive painted bill boards; in large printed banners; in window transparencies; by distributing without charge among customers of complainant many thousands of three pound sacks of flour made up as an exact reproduction in miniature of the package shown as Exhibit "A" to the aforesaid affidavit of Henry Schurman; by distributing among its customers thousands of little pin cushions, perfumed bags made of silk and bearing upon them the Tea Rose name and label in fac-simile of the flour sacks as shown in the exhibit
34 to the affidavit of Henry Schurman; by distributing among its customers, free of charge, more than a million bill heads,

letter heads, statement heads, envelopes and post cards bearing the customer's name and advertisement of his business, with a fac-simile of the sack attached as an exhibit to the Schurman affidavit printed on the face of the said stationery; at great expense having prepared and furnished to moving picture shows slides wherein the name Tea Rose is advertised as a product of complainant's flour mill and by contributing to the expense of having these slides exhibited in the moving picture shows; by conducting at considerable expense limerick contests involving the use of the name Tea Rose; by distributing among its customers pocket knives bearing the name Tea Rose and the name of complainant's mill; by distributing among its customers and the public calendars bearing the name Tea Rose and the fac-simile of the label as shown on the exhibit to the Schurman affidavit. By aid of this expensive and persistent compaign of advertising the name and label Tea Rose as the product of complainant's mill and as the representative of a highly satisfactory quality of flour, has been established firmly throughout the territory above designated, and as the result the sales of flour made by the complainant have increased one hundred and fifty per cent, necessitating the enlarging of the mill's capacity, to almost double what it was at the time the campaign of advertising began, and more than half of all the flour sold by complainant is sold under this name and brand. Such of the flour as is not sold under this name and brand is successfully marketed because of the reputation which has been attained from the Tea Rose flour. The Hanover Star Mill has become known primarily as the Tea Rose mill, and the reputation of the mill rests upon and is inseparably bound up with the reputation of Tea Rose flour. Such is the reputation of Tea Rose flour, and the incidental reputation of the lower, and higher grades of flour made by the complainant, as the result of the advertising and the uniform maintenance of quality of this flour, that whereas this affiant was for many years under the necessity of constantly traveling throughout the territory aforesaid to cultivate and hold his trade, the orders now repeat with little or no solicitation, and twice the amount of flour is now sold, with almost no traveling at all, than was formerly sold by constant traveling. The amount of flour sold by complainant in the
35 territory aforenamed now amounts to between $300,000 and $400,000 a year. Over half of this comes from the sale of Tea Rose, and all of it is in a large measure dependent upon the reputation of Tea Rose. Tea Rose flour is a high grade patent flour, but not a fancy patent. It is a high priced flour but not the highest priced. The complainant has throughout affiant's entire connection with it, maintained the same standard of qua-ity for Tea Rose year by year, as nearly the same standard as the necessary variations in wheat crops would permit, and also every customer after once purchasing this flour gives repeating orders.

Affiant further shows that when he began the sale of the complainant's products in the aforedesignated territory, there was in that territory no flour for sale under the name Tea Rose or under any brand of similarity to the Tea Rose brand; nor did any flour

under the name Tea Rose or under any brand similar to complainant's Tea Rose brand appear upon the market in the aforesaid territory until after the affiant had been engaged in selling this brand of flour for five years or more. After he had been so engaged for something over five years, and about two years ago, he saw a few barrels of flour bearing the name Tea Rose and with a label very similar to that adopted by complainant, in a small retail store in Tupelo, Mississippi, and upon inquiry was told that this flour was purchased from a wholesale grocer of St. Louis, and upon this flour the name of the Steeleville Milling Company appeared. Affiant saw nothing more of Tea Rose flour in the aforedesignated territory until in January, 1912, when affiant saw flour for sale in the Walker Chandler Mercantile Company's store in West Point, Mississippi, and upon inquiry of the Merchant in whose place this flour was found learned from him that the flour was being sold to them by the Steeleville Milling Company on a basis of seventy-five to eighty cents a barrel higher than the price at which complainant was offering its Tea Rose flour throughout the aforedesignated territory. With the exception of these two instances affiant never encountered any Tea Rose flour in any portion of his territory during all of his years of service for the complainant until Tea Rose flour was offered for sale by the Steelville Milling Company through the defendant at Greenville.

At about the time affiant saw the Steelville Milling Com-
36 pany's flour in West Point, Mississippi, he received a letter from the Steelville Milling Company in which they requested him to undertake the sale of flour made by them, saying in part,

"January 24, 1912.

"If you are open for a high grade flour account we would like to hear from you and make connection with you. Trusting that we may hear from you at an early date and that we may be abel to get connection with you, we are

"Yours truly, ——— ———."

This letter was received by the affiant immediately upon his return to his home at Tuscaloosa after seeing the flour at West Point, Mississippi, and at about the same time he received a telegram from his customer Jno. S. McMullan at Greenville, Alabama, stating to him that D. D. Metcalf had told the trade at Greenville that he, Metcalf, had the original Tea Rose flour and that the complainants were only imitators in respect to the use of the Tea Rose name and brand. With these facts before him, and as a means of drawing information from the Steelville Milling Company, affiant made answer to the letter of the Steelville Milling Company as follows, after quoting the telegram just — (under date of January 31):

"I will be glad to have you name your delivered price on your flour; also giving brand the flour is to be sold under,"

and on the next day, with the same purpose in view, wired the Steelville Milling Company:

"Quote flour delivered Tuscaloosa eighth naming brands you sell under,"

and to this the Steelville Milling Company replied, under date of February 1st, 1912, by telegram, as follows:

"Quote Queen Quality five thirty-five; Tea Rose four eighty in eight-s delivered carloads including commission."

and upon receipt of this telegram affiant wrote to the Steelville Milling Company as follows, after quoting the telegram just above set out;

37 "The writer travels extensively in the State of Mississippi and has seen your Tea Rose flour at a number of places, but was under the impression that this flour graded some fifty to seventy-five cents over standard patents. I thought perhaps the telegram was somewhat mixed and that Tea Rose should be $5.35 instead of $4.80."

To this letter the Steelville Milling Company replied under date of February 3rd;

"The prices mentioned in your letter are exactly as we wired you, namely, Queen Quality $5.35, Tea Rose $4.80, delivered in eight-s, carloads including commission.

"In regard to our Tea Rose brand we wish to state that we formerly (and in some instances still use it) used this brand on our best patent grades, but owing to the fact that another mill appropriated the brand and used it on a cheaper grade of flour, we have in the past few years displaced it wherever possible with our 'Gilster's Best,' 'Alice' or 'Lydell' brands and are beginning to use Tea Rose on our lower grades. As mentioned before we still use the Tea Rose brand to some extent on our best trade, and should your trade prefer this brand to our Gilster's Best we shall be pleased to fill it for them. We can then work our Banner brand for the Tea Rose for our lower grade. We prefer, however, to have you sell the best grade under our Gilster's Best brand as this is the brand on which we have concentrated our principal advertising and in view of its increasing popularity we would think that it would be the logical brand to push."

Elsewhere in the letter this quotation is made:

"The price of Gilster's Best is $5.80 per barrel delivered in eight-s, carloads including commission."

Affiant further shows that among other evidences of the long continued use of the Tea Rose name and brand by the complainant for its flour, he discovered among the original records of the complainant, and now has in his possession, correspondence which began in December 1893, between M. Kosmack & Company, of Glasgow, Scotland, and the complainant by which the Glasgow firm purchased of the complainant five hundred barrels of Tea

38 Rose flour, and the original invoice and way bill under which this flour was shipped by complainant to Glasgow, Scotland.

Affiant states that he has, for the past seven years, devoted his

time, thought and attention to the development of a market for the complainant's flour in the aforedesignated territory, and has made a study of the value of such market when once established and of the advantages to be gained by a mill, from the possession of a well-known thoroughly advertised brand; for a flour of well sustained reputation, and in affiant's opinion the trade which has grown out of and will naturally continue to come through the campaign of thorough advertising and well maintained quality of the Tea Rose flour throughout the aforedesignated territory is of very great value to the complainant. In the opinion of affiant the value of this name and reputation in the territory aforesaid compares favorably with the value of the physical properties owned by the complainant corporation, which properties are worth in their neighborhood of $100,000.

Affiant believes that for another person or corporation to enter this territory and foster its product upon the public as the product of complainant would be extremely injurious from a financial point of view, and this injurious result will result regardless of whether the flour sold by the infringer is a good flour or a bad flour; if sufficiently good it might enable the infringer to take possession of the market; if it was a bad flour it would ruin the market for the complainant.

Affiant further shows that he has never at any time during his entire connection with the complainant corporation, nor prior thereto seen or heard of any Tea Rose flour made by Allen & Wheeler, or Allen & Wheeler Company upon the market, nor has affiant seen any flour marketed by Allen & Wheeler or Allen & Wheeler Company upon the market in any portion of his aforedesignated territory at any place whatever. Affiant shows that had there been any flour marketed by Allen & Wheeler sold in his territory he would have known it as he has traveled over it many times during this period, and has made diligent efforts to know just what flours were on sale. Affiant never heard of any Tea Rose flour marketed by Allen & Wheeler Company, or by Allen & Wheeler, until the affidavits of Messrs. Allen & Wheeler, filed in this case, were shown him.

HARRY N. EDDINS.

39 Subscribed and sworn to before me this 9th day of April, 1912.

[SEAL.] FLEETWOOD RICE,
Notary Public.

Filed 10th day of April, 1912, at 10 o'clock A. M.
HARVEY E. JONES, *Clerk.*
By ELLEN W. JACKSON, *Deputy.*

Affidavit of John S. McMullan.

Before the undersigned authority, personally appeared John S. McMullan, who being first duly sworn deposes and says: I am in

the wholesale grocery business, am president of the John S. McMullan Grocery Co., at Greenville, Butler County, Alabama, and have been in the grocery business in Greenville for about fourteen years.

About four years ago I made the acquaintance of Mr. Harry N. Eddins, the general sales manager of the Hanover Star Milling Company, a flouring mill concern of Germantown, Ill., and was by him induced to buy from that concern a car of Tea Rose flour, which is put up in sacks bearing the name Tea Rose and the distinctive markings and letterings shown on the sack which is attached to the deposition of Mr. Henry Schurmann filed in this cause, and in barrels, the ends of which are marked with the label bearing the name of Tea Rose and identical markings and lettering.

At that time there was no flour being sold under the name of Tea Rose in Butler County, or any adjoining counties. Finding that this was a grade of flour which gave satisfaction to the trade affiant gave some attention to pushing the sale of this brand and has during all the past four years built up a trade for Tea Rose flour in Butler, Covington, Conecuh, Lowndes, and Crenshaw Counties of about 5,000 barrels a year; of other flours manufactured and sold by the Hanover Star Milling Co. Affiant has been able to sell largely upon the strength and reputation of Tea Rose an additional 3,000 barrels per annum and has by means of the trade commanded for this make of flour been able to largely demand the flour trade of that section. In this effort to build the trade up, affiant has been largely assisted by liberal advertising methods employed by the Hanover Star Milling Company, among which were attractive stationery supplied by the complainant to affiant, by sample sacks of flour, by miniature pin cushion sacks, sign boards, banners and newspaper advertising; by the mill advertising for affiant's wholesale house, which in the language of the trade is known as missionary work, and the house sent a salesman to work up the retail trade for affiant. No effort was made by any other person to sell flour under the Tea Rose name or brand in any of the counties heretofore named until about the 19th day of February, 1912, when the defendant, D. D. Metcalf, received at Greenville, Ala., a car load of flour branded with the name Tea Rose and with the picture of a rose, put up in packages very much like the picture in which the product of the Hanover Star Milling Company's flour was packed. There has been no flour sold at Greenville under the name of Tea Rose, except such as was sold by said Metcalf of that car prior to the issuing of the restraining order in this case.

Affiant further says that in his opinion, as a merchant, that the name Tea Rose and the brand under that name is of great value to complainant and that for any other mill to be allowed to sell their flour under that name and a like brand would be a serious financial injury to the complainant in that territory in which the affiant does business.

Affiant made inquiry to ascertain at what price the said Metcalf was selling Tea Rose flour made by the Steedville Milling Company and from them learned, and upon this information states the

fact to be, that said Metcalf was offering said Flour for sale at a price of 25 cents per barrel cheaper than the price at which the Tea Rose flour of the Hanover Star Milling Company was being marketed, that the price at the time of Steedville Milling Co. flour was received at Greenville being $5.25 per barrel in cotton sacks and the said D. D. Metcalf upon receiving the said flour from the Steedville Milling Company advertised to the public at Greenville and surrounding territory, that he had received a shipment of the original Tea Rose flour and upon such advertisement offered for sale and did actually sell the product of the Steedville Milling Company in sacks labeled so nearly like those of the Hanover Star Milling Company that from casual observation they appeared to be identical.

[SEAL.] JOHN S McMULLAN.

41 Subscribed and sworn to before me this the 1st day of April, 1912.

G. H. TATUM,
Notary Public, Butler County, Ala.

Filed 10 day of April, 1912, at 10 A. M.

HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Affidavit of Henry Schurmann.

Before the undersigned authority, personally appeared Henry Schurmann, who being first duly sworn deposes and says: Affiant is the President of the complainant corporation and has been president of this corporation since 1885, and that during all that time — and now is the head of this corporation and has a personal knowledge of the business and operations of said corporation in all essential matters. Within a few years after the organization of this corporation in 1885 it adopted as one of its brands of flour manufactured and marketed by it the name Tea Rose and adopted as the package or container of the flour manufactured and marketed under the name Tea Rose a design the same as that shown upon the flour sack attached to this affidavit and made an Exhibit thereto. The sacks which have been used from the beginning of the use of this name of brand were the same as the attached sack and where the flour was sold in barrels the design on the barrel head was exactly the same as the design upon the sack, with the exception that the label was round in order to fit the end of the barrel.

Affiant now has in his possession at his place of business in Germantown, Ill., records and memorandum which verify his statement that this name Tea Rose and this brand as shown on attached sack have been in use by the Hanover Star Milling Company beginning with and continuing since the year 1893, and affiant recollects and now testifies that this sack and brand was used for some years prior to the year 1893, and to affiant's best recollection

this use extended back to and including the year 1886. Affiant's records and memorandums are not complete, and have been in part misplaced by the moving of his office, and but for this fact his records would show an adoption and continuous use of this
42 name and brand for a period of some years prior to 1893.

Affiant has throughout his entire connection with the Hanover Star Milling Company been diligent to protect its adopted brands and names from infringement, and at no time during his connection with the complainant corporation has the knowledge of any infringement come to his notice prior to that set forth in the bill of complaint, except upon one occasion in about the year 1905, a Mr. Herman Gilster, who is said to be one of the officers of the defendant corporation called upon affiant at his place of business in Germantown, Ill., and told him that some conflict had arisen at Meridian, Miss., in the sale of a flour made and marketed by Gilster under the name of Tea Rose and the complainant's Tea Rose flour. In this conversation Mr. Gilster endeavored to purchase the Tea Rose brand from affiant after affiant had assured him that the complainant corporation had been marketing flour under this name and brand for many years prior thereto. Upon affiant's declining upon behalf of complainant corporation to sell this name and brand to Mr. Gilster, he made no further claim or insistence that he had a right superior to complainant's to the use of this name or brand. Subsequent and immediately after Mr. Gilster's visit to affiant, affiant received a communication from the secretary of the National Miller Association making inquiry as to the first use of the Tea Rose name and brand, and to this letter affiant, upon behalf of complainant corporation, replied that the Hanover Star Milling Company had the first and superior right to the name and brand by reason of having had it in continuous use for some ten years prior to the date of that letter.

Subsequent to Mr. Gilster's visit and the writing of the letter last indicated, affiant was never informed in any way that the name Tea Rose or the distinctive markings adopted as the accompaniment of the name as shown on the attached sack were being used by the defendant corporation, or by any other milling concern until the present controversy arose. Affiant has seen affidavits prepared for filing in this cause upon behalf of the defendant, one made by H. M. Allen and the other by Thos. B. Wheeler, wherein it is asserted that Messrs. Allen & Wheeler have had in use a brand and name of Tea Rose for flour of their manufacture since 1858 and wherein it is further indicated that they have sold flour so branded in Ohio, New York, Boston and Pitts-
burgh. Affiant says that these affidavits are the first know-
43 ledge or notice that he has ever had that the name Tea Rose was used by Messrs. Allen & Wheeler and further states that the complainant corporation has never marketed or attempted to market any flour of his manufacture in any of the markets wherein said affidavit showed that the Allen and Wheeler flour was sold.

Affiant further says that there is no similitude whatsoever between

the distinctive markings of the Allen & Wheeler Tea Rose and his marking as shown on attached sack.

Complainant corporation about eight years ago entered upon a policy of building up a trade for its product in the south, in which section, up to that time, it had done a very limited business. With this end in view it employed for the purpose of developing this southern territory one Harry N. Eddins, and placed him in charge of the sales of the output of the mill. Mr. Eddins immediately upon being so employed began to offer complainant's product for sale in North and Western Mississippi, throughout Alabama, western Georgia and North Florida. That soon after Mr. Eddins began his work complainant decided that for the purpose of pushing the sales of his product and establishing a reputation for its mill that one brand of flour should be made a basis of quality and price and should be given special preference in advertising. The Tea Rose flour being of a quality best suited for general consumption was selected as this best flour and from that time on the complainant especially advertised Tea Rose Flour and subordinated the notoriety of its other brands and in all quotations to its customers quoted the price of Tea Rose flour as its basis, giving the prices of other brands sold by complainant as so much below or above Tea Rose priced as the basis. From thence forward advertised Tea Rose flour at the expense of many thousands of dollars in each of the following expensive ways:

Its salesman distributed throughout the aforesaid territory thousands of three pound sample sacks of Tea Rose flour, each sack branded in miniature in a manner identical with the sack hereto attached as an exhibit. That miniature sacks were given absolutely free to customers of complainant for distribution among the retail customers. By advertising extensively in newspapers—by erecting hundreds of large canvas bulletins or sign boards bearing the name Tea Rose. By distributing hundreds of large cloth banners bearing a fac simile of the Tea Rose name and brand as shown on the
44 attached sack. By distributing among its customers hundreds of a patent device by which the name Tea Rose with the distinctive words and markings of the attached sack were transferred to window panes, making transparent window signs, by furnishing free of charge and presenting to its customers letterheads bearing the name of its customers with a facsimile of attached sack printed on the face of said letter-heads. By a great expense having prepared and furnishing to moving picture shows slides wherein the name Tea Rose was advertised as the product of complainant's flouring mills and after these slides were made and distributed complainant either induced its customer to pay the picture shows to exhibit these slides or helped him to bear the expense of having them so exhibited in the moving picture shows. By printing and distributing among its customers attractive post cards lithographed in colors, bearing the brand and name of Tea Rose as shown on the attached sack. By a large expense distributed among its customers a little silk pin cushion sacks made as an exact facsimile of the flour sacks, all bearing the name and brand of Tea

Rose as shown on the attached sack. By aid of this expensive and persistent campaign of advertising, which has been carried on without interruption for some eight years past and by the efforts of the salesmen in the territory aforestated, the sales of flour as made by the complainant have increased 150 per cent, necessitating the enlargement of the mill's capacity to almost double what it was at the time of the campaign of advertisement began. More than half of all the flour sold by complainant is sold under the name and brand is successfully marketed because of the reputation which has been attained for the Tea Rose flour and the Hanover Star Mills has become known primarily as the Tea Rose mill and the reputation of the mill rests upon and is inseparably bound up with the reputation of Tea Rose Flour. During all of these eight years during which the sales of this flour has been almost trebled in the territory aforestated and during all of the time that this expensive advertising has been going on there has been no effort, so far as this affiant knows, and he has had ample opportunity of knowing, because he has traveled over this territory once each year during all of that time, the defendant has made no effort to sell any of its products under the name of Tea Rose and has asserted in the aforesaid territory no claim to that name or brand. The business of the complain-
45 ant rests upon the reputation of Tea Rose flour as thus built up now amounts to between $300,000.00 and $400,000.00 per year, over half of which comes from the sales of Tea Rose flour, and all of which is in large measure dependent upon the reputation of Tea Rose flour.

Affiant further says that the flour which is now marketed under the name of Tea Rose is the same flour which he has all along sold under that name and brand. That it is a high grade patent flour, but not a fancy patent, a high price flour, but not the highest priced flour.

That affiant has throughout his use of this name and brand maintained the same standard of quality for Tea Rose flour year by year, or as nearly the same standard as the necessary variation in wheat crops would permit and that there has never been any difficulty in holding and increasing the patronage of a customer once obtained for this grade of flour and that there has never been any variation from this standard of quality during the use of this name and brand.

Affiant further says and shows that if the defendant is allowed to sell its product under the name of Tea Rose and with the brand that it has adopted in any of the territory in which this complainant has built up a reputation for Tea Rose flour it will be destructive of all of his outlay and labor in building up the reputation of his product and well-nigh ruinous to his business.

HENRY SCHURMANN.

Sworn to and subscribed before the undersigned notary public of Germantown, Clinton County, State of Illinois.

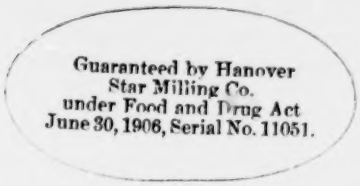
[SEAL.] ARNOLD B. MICHELS,
N. P. for Clinton Co., Ill.

My commission expires Aug. 25, 1913.

Filed 10 day of April, 1912, at 10 o'clock A. M.
HARVEY E. JONES, *Clerk*,
By ELLEN W. JACKSON, *Deputy*.

46 (The wording on sack attached to Affidavit of Henry Schurmann is as follows:)

(Words enclosed in ellipse printed in red.)



(Red Star) Hanover Star (Red Star)
Milling Co.
(Design roses, one large & two smaller Lbs.
roses, turned to right, colors green
and white, between 24 and Lbs.)
Tea Rose
Special Patent
Flour
Germantown, Ill.
American Bag Co., Memphis.
Tea Rose.

(Wording above the design in gree [green] "Tea Rose" just below design in red, balance of wording in Blue except "Germantown, Ill.," and "American Bag Co., Memphis," which is in green.
(The words "The World's Best" shown on the back of sack described above.)

Affidavit of W. W. Nicholson.

STATE OF ALABAMA,
Butler County:

Before me, G. H. Tatum, a Notary Public in and for said State and County, personally appeared W. W. Nicholson, who being by me first duly sworn to speak the truth, the whole truth and nothing but the truth, on oath deposes and says: That he is a resident of Greenville, Butler County, Alabama, and Treasurer and General Manager of the John S. McMullan Grocery Company at
47 Greenville, Butler County, Alabama; and that he has knowledge of the books, records and business of the said Grocery Company. That for about four years past the said Grocery Company has been, and is now, selling and offering for sale "Tea Rose" Flour, manufactured by the Hanover Star Milling Company of

Germantown, Illinois, that there is a large demand for said flour and that it is very popular in Butler County and adjoining counties, and that the sales of the said John S. McMullan Grocery Company of said Flour are very large; that large numbers of their customers ask for and demand "Tea Rose" Flour, and will take no substitute. That up until a few weeks ago the said John S. McMillan Grocery Company were the only people selling and offering for sale "Tea Rose" Flour in Butler County and the territory near and adjacent thereto; and, as aforesaid, the demand for, and the popularity of, the said "Tea Rose" Flour was very great. That within the past few weeks one D. D. Metcalf, a resident of Greenville, Alabama, on account of the great demand for "Tea Rose" Flour has made many efforts to secure "Tea Rose" Flour for his customers who were clamoring for it. Affiant further states that on account of said John S. McMullan Grocery Company handling and having the exclusive sale of the original "Tea Rose" Flour manufactured by the said Hanover Star Milling Company, the said D. D. Metcalf was unable to obtain it for his customers, but that within the past few weeks, and during the first part of February, 1912, the said D. D. Metcalf announced to the public and trade in Butler County that he had secured "Tea Rose" Flour, and that it was the original "Tea Rose" Flour. Affiant states further that on to wit, the 19th of February, 1912, the said D. D. Metcalf put large banners on his mules and dray, by which banners he announced and advertised to the public that he had received a shipment of "Tea Rose" Flour, and announced on said banners that it was "Steeleville Milling Company's 'Tea Rose' Flour, Best Quality." That afterwards the said D. D. Metcalf received a shipment of flour manufactured by the Steeleville Milling Company at Steeleville, Illinois, which flour was labeled and called "Tea Rose" Flour, and was put up in packages substantially identical to those used by the Hanover Star Milling Company, one of which packages has been marked Exhibit "A" and filed in the District Court of the United States at Montgomery,

Alabama. That the said D. D. Metcalf did offer for sale and
48 did sell to J. R. Smith at Shreve, Alabama, several barrels of said flour, which he called "Tea Rose" flour, and also sold quantities of said flour to Pink Huston, of Garland, Alabama, N. M. Rhodes Mill & Mercantile Company at Shell, Alabama, and to other parties; that said flour was labeled "Tea Rose" Flour, and the said D. D. Metcalf represented it to the purchasers thereof and to the public as the original "Tea Rose" Flour, and that he was going to handle it in future. Affiant further states that the said D. D. Metcalf unfairly represented to the public and trade at Greenville and the surrounding territory that he had received a shipment of "Tea Rose" Flour and that it was the original "Tea Rose" Flour, when, in fact, it was not the original "Tea Rose" Flour. Affiant further states that the said conduct of the said D. D. Metcalf is calculated to, is intended to, and does injure the trade of the John S. McMullan Grocery Company and its sales of their said original "Tea Rose" Flour, and that his conduct threatens to cause irrepar-

able damage and loss to the said John S. McMullan Grocery Company in their sales of the said "Tea Rose" Flour.

W. W. NICHOLSON.

Affirmed, sworn to and subscribed before me, G. H. Tatum, a Notary Public, by the said W. W. Nicholson, on this 23rd day of March, 1912.

[SEAL.]

G. H. TATUM,
Notary Public, Butler County, Alabama.

Filed 10 day of April, at 10 A. M.

HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Affidavit of Ed. Schurmann.

THE STATE OF ILLINOIS,
County of Clinton:

Before me, Henry C. Michels, a Notary Public in and for said County, in said State, personally appeared Ed. Schurmann, who, being by me first duly sworn to speak the truth, the whole truth, and nothing but the truth, deposes and on his oath says:

First. That he is Secretary of the Hanover Star Milling
49 Company, a corporation organized and existing under the laws of the State of Illinois, and a citizen of that State.

Second. That as such officer of said corporation he has access to and knowledge of the books, records and of the business of said corporation, and that said Hanover Star Milling Company has for many years towit, 18 years, been engaged continuously and is now engaged in the manufacture of a certain superior flour, to which during all these years it has continuously given the name "Tea Rose" and has been continuously and is now marketing the same in wrappings with distinctive markings bearing the name "Tea Rose," and particularly described and illustrated by the cut hereto attached and marked Exhibit "A;" that during all these years said corporation has continuously and uninterruptedly claimed said name and said design as its common-law Trade-Mark.

Third. That the said corporation has for many years past, towit, 10 years, placed and is now placing upon the market in Alabama said flour, and that through a careful maintainance of a very high and uniform quality of said flour has built up for the same a lucrative market and has established an envied reputation for the same until at the present time said corporation sells more than $175,000 worth of said flour each year in Alabama.

Fourth. That by reason of the excellence and reputation of "Tea Rose" flour said corporation, through its agents, is enabled to sell other flours of its manufacture to great advantage, and sells great quantities of the same other than "Tea Rose" flour annually in the State of Alabama, and has also a lucrative trade from the sale of said "Tea Rose" flour and other brands of its flour in a great many

other States, towit, Florida and Georgia; and affiant states that in all of its sales of said "Tea Rose" flour it has continuously and uninterruptedly sold the same under the name of "Tea Rose" and in the wrappings above described, claiming all the time said name and wrappings as its Common-Law Trade Mark.

Fifth. That said Hanover Star Milling Company is the
50 first to make the flour called "Tea Rose" flour and to so call it under the name of "Tea Rose" flour and to claim said name as its Common-Law Trade-Mark, and is the first to market it in wrappings shown by Exhibit "A" and to claim said design as its Common-Law Trade-Mark, and that up until a few weeks last past said "Tea Rose" floir [flour] was made and sold exclusively by the Hanover Star Milling Company in Alabama, and by no other persons, and was offered for sale by no other person in Alabama, except said Hanover Star Milling Company and its duly authorized agents, nor up until a few weeks last past was there any flour made, sold or offered for sale in the flour manufactured, sold and offered for sale by said Hanover Star Milling Company. And affiant further states that the said Hanover Star Milling Company was the first to so claim said name and said design as its Common-Law Trade-Mark.

Sixth. Affiant is informed and believes and therefore states upon such information and belief that within a few weeks last past a flouring mill located at Steeleville, Illinois, has, through the agency of one D. D. Metcalf, been marketing in Alabama, and particularly in Butler County, Alabama, flour different from that made by the Hanover Star Milling Company and has been so marketing the said flour in packages substantially identical with those used by the said Hanover Star Milling Company in marketing its "Tea Rose" flour, and has in the sale of such flour been using the name "Tea Rose." One of the packages so used is now filed with the Bill of complaint in this cause (Hanover Star Miling Co. vs. D. D. Metcalf in the U. S. Court of Montgomery, Ala.) and it is to such packages that affiant now has reference. Affiant further states on information and belief that the said D. D. Metcalf by using the name "Tea Rose" and substantially identical packages has been deceiving the purchasers of Butler County into the belief that they are buying the original article "Tea Rose" flour. And affiant further states on information and belief that the said D. D. Metcalf has so used said name "Tea Rose" and substantially identical packages with the fraudulent intent of so deceiving the purchasers of flour in Butler County and vicinity, and that he has in fact sold the said Steeleville flour to parties in Butler County and vicinity who actually believed from statements of the said D. D. Metcalf that they were
51 buying the original "Tea Rose Flour." And affiant further states on information and belief that the use of the name "Tea Rose" and the use of said substantially identical packages, are intended to, are calculated to, and do in fact deceive the ordinary and casual purchaser of flour into the belief that he is purchasing the article of that name manufactured by the said Hanover Star Milling Company.

Seventh. Affiant further states that the said D. D. Metcalf in acting as the broker or distributor of the said Steeleville, Illinois, article, has been acting with the full knowledge of the unfair trade and fraudulent competition involved in placing before the trade the Steeleville, Illinois, article under the name of "Tea Rose" and that although he has been fully notified and warned by the said Hanover Star Milling Company that his selling of the Steeleville, Illinois, article, under the name of "Tea Rose" is violative of its rights and is unfair competition and that it is an infringement upon said Hanover Star Milling Company's Common-Law Trade Mark, and that said Hanover Star Milling Company was claiming the same as its trade mark, and that he has persistently and actively engaged in said deceptive use of the name "Tea Rose" and of said substantially identical wrappings.

Eighth. Affiant further states that the unfair competition so instituted by said D. D. Metcalf at Greenville and in Butler County, and in the State of Alabama, threatens great pecuniary loss and irreparable injury to the said Hanover Star Milling Company, and that it threatens to destroy and destroys the prestige of "Tea Rose" flour, and that it takes from the said Hanover Company and transfers to its competitors all the good which inheres in the reputation and trade built up for the said "Tea Rose" flour, and that if such unfair competition is continud the Hanover Star Milling Company will lose its highly valued asset of said Common Law Trade Mark and the reputation and primacy of "Tea Rose" flour; and affiant states that the matter involved in this controversy exceeds, exclusive of interest and cost, the sum or value of three thousand dollars.

ED. SCHURMANN.

Sworn to, affirmed and subscribed before me Henry C.
52 Michels, by the said Ed. Schurmann, on this 21st day of March, 1912.

HENRY C. MICHELS,
[SEAL.] *Notary Public, Clinton Co., State of Illinois.*

My commission expires May 12, 1915.

Filed April 10, 1912.

HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

(Below is the wording on "Exhibit A," attached to Affidavit of Ed. Schurmann.)

Wording on Sack marked "Exhibit A" heretofore copied at Page 46.

* * * * * * *

Affidavit of G. W. Lewis.

Before the undersigned authority, personally appeared G. W. Lewis, who being first duly sworn deposes and says that he resides at Greenville, Ala., and is one of the stockholders of the J. S.

McMullan Grocery Co., and has been associated with Mr. J. S. McMullan in the grocery business in Greenville for thirteen years past, but about four years ago affiant and Mr. McMullan in their associate business began to sell a brand of flour known as Tea Rose put up in packages like the sack attached to the affidavit of Mr. Henry Schurmann filed in this cause and in barrels which have on their ends a label with the word Tea Rose and the picture of a rose and the markings and letterings identical with those as shown on the sack attached to the Schurmann affidavit and that at the time this Tea Rose flour was first handled by affiant and Mr. McMullan there was no other Tea Rose flour being sold in Butler County or any of the nearby counties of Alabama. That during the past four years affiant's chief business has been traveling salesman for the J. S. McMullan Grocery Co., and he has been traveling over the counties of Butler, Conecuh, Covington, Lowndes, Crenshaw
53 and that in all of them has been sold Tea Rose flour of the complainant corporation and he has been much assisted in these sales by a liberal and expensive advertising method adopted and pursued by the complainant corporation and the sales of this flour have grown from the beginning made by one car about forty years ago until there is now sold in the counties last named about 8,000 barrels of the flour and of these sales approximately 5,000 barrels is of the flour labeled Tea Rose and the other flour of the complainant's sold in the territory is sold largely upon the Tea Rose reputation. No Tea Rose flour of any sort, kind or description other than made by the complainant company was sold in the counties aforestated until about the 19th day of February, when a car of flour which appears to have been manufactured by the Steeleville Milling Company of Steeleville, Ill., was shipped to D. D. Metcalf at Greenville. This flour is labeled Tea Rose in red letters and has upon the sacks, one of which is hereto attached and made a part hereof, a picture of a flower and its markings is so very similar to the package in which the Tea Rose flour of the complainant is put up that it is not readily distinguishable and requires close observation to tell the difference, and the said Metcalf upon receiving this flour advertised it and offered it to be original Tea Rose flour, at a price of 25 cts. per barrel less than at which the Tea Rose Flour of the complainant company was being marketed, and at that much less than the price fixed for the sale by the Hanover Star Milling Company, and the price fixed for the sale of the Tea Rose by the Hanover Milling Company at that time was $5.25 per barrel. Cotton.

G. W. LEWIS.

Subscribed and sworn to before me at Greenville, in Butler County, Ala.

G. H. TATUM,
[SEAL.] *Notary Public, Butler Co., Ala.*

Filed 10 day of April, 1912, at 10 o'clock A. M.

HARVEY E. JONES, *Clerk.*
By ELLEN W. JACKSON, *Deputy.*

6—270

54 (Below is wording on sack attached to Affidavit of G. W. Lewis.)

Wording shown on Exhibit heretofore copied at Page 5 as "Exhibit A."

* * * * * * *

Supplemental Affidavit of Herman E. Gilster.

THE STATE OF ILLINOIS,
Randolph County, ss:

Herman E. Gilster, being first duly sworn on his oath, deposes and says that during the year 1899 to 1903 inclusive he periodically traveled through the states of Alabama and Mississippi in the capacity of traveling representative and salesman of the Steeleville Milling Company, of Steeleville, Illinois, and as such he sold to the firm of Winner & Mayer, jobbers, of Meridan, Mississippi, large quantities of flour labeled and branded "Tea Rose" and "Banner"; and that the flour labeled and marked "Tea Rose" was marked with the same name and design as at present used and shown by the exhibit attached to the affidavit of Albert H. Gilster and marked "Defendant's Exhibit No. 1," and that he sold to said dirm [firm] the following quantities of flour of which at least ninety per cent was so marked "Tea Rose":

1901

Feb. 2 cars	July 4 cars	Oct. 3 cars
Mar, 1 "	Aug. 4 "	Nov. 4 "
Apr. 1 "	Sept. 5 "	Dec. 3 "
May 2 "		

1902

Jan. 6 cars	May 6 cars	Sept. 4 cars
Feb. 1 "	June 2 1-2 cars	Oct. 8 "
Mar. 5 "	July 4 "	Nov. 6 "
Apr. 3 "	Aug. 4 "	Dec. 2 "

55

1903

Jan. 2 cars	May 3 cars	Oct. 4 cars
Feb. 4 "	June 3 "	Nov. 1 "
Mar. 4 "	July 6 "	
Apr. 4 "	Aug. 8 "	

Affiant further says that shortly after the last sale above recorded said firm of Winner & Meyer dissolved partnership and the firm of Winner, Klein & Co., and Meyer Brothers organized. That affiant made every effort to sell the last named firms but was unable to sell but a few cars to Winner, Klein & Co., and none to Meyer Brothers, and was advised by the said Meyer Brothers that they had bought from the Hanover Star Milling Co., flour labeled and marked "Tea Rose" and similar in appearance to the package put up by the Steeleville Milling Company, at a lower

price than affiant was able and authorized to make; and as a result of the fact that Meyer Brothers were able to buy "Tea Rose" flour manufactured by the Hanover Star Milling Company of Germantown, Ill., at a lower price than affiant could sell them, and as a result in turn that Meyer Brothers could *see* [sell] the Hanover Star "Tea Rose" at a lower price than Winner, Klein & Co., could sell the "Tea Rose" of the Steeleville Milling Company, the Steeleville Milling Company lost all of their trale in and abut Merician, [Meridian] Mississippi, which they had built up by their extensive advertising campaign of the said "Tea Rose" brand of flour.

Affiant further states that he has read the affidavit of Henry Schurmann, President of the Hanover-Star Milling Company, which was of no date and which is filed herein in support of the complaint of the petitioner, and says that the statement of said Henry Schurmann in said affidavit, to the effect that affiant called upon said Schurmann at his place of business in Germantown, Illinois, and endeavored to purchase the "Tea Rose" brand from said Schurmann, is false and untrue; affiant states that he, at no time, endeavored to purchase the "Tea Rose" brand from said Schurmann or from any officer or agent of the Hanover Star Milling Company, but that the sole object of his said visit is recited and contained in his former affidavit.

HERMAN E. GILSTER.

56 Subscribed and sworn to before me this 9 day of April, 1912.

J. FRED GILSTER,
[SEAL.] *Notary Public.*

My commission expires July 26th, 1914.

Received by mail and filed 11th day of April, 1912, at 9 A. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of G. W. Williamson.

Personally appeared before me, J. B. Powell, Jr., a Notary Public, in and for Butler County, in the State of Alabama, G. W. Williamson, who being duly sworn, on oath disposeth and saith that on the 4 day of March, 1912, he purchased from D. D. Metcalf 1 barrel of Tea Rose Flour manufactured by the Steeleville Milling Company of Steeleville, Illinois, and that this flour was purchased through D. D. Metcalf. At the time this flour was sole me he told me it was Tea Rose flour and was manufactured by the Steeleville Star Milling Company, of Steeleville, Illinois. Neither he or any one else ever told me that it was manufactured by the Hanover Star Milling Company, or even represented it to me in any manner but to the contrary that it was Tea Rose Flour manufactured by the Steeleville Milling Company, Steeleville, Illinois.

G. W. WILLIAMSON.

Subscribed and sworn to before me this 2nd day of April, 1912.

J. B. POWELL, Jr.,
Notary Public.

Filed 11 day of April, 1912, at 9 o'clock A. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

57 *Affidavit of Pinkney Huston.*

Personally appeared before me, J. R. Clepper, a Justice of Peace, in and for Butler County, in the State of Alabama, Pinkney Huston, who being duly sworn, on oath di*s*poseth and saith that on the 26th day of February, 1912, he purchased from D. D. Metcalf 10 barrels of Tea Rose flour manufactured by the Steelville Milling Company, of Steeleville, Illinois, and that this flour was purchased through H. Hubert May, who was salesman for D. D. Metcalf. At the time Mr. May sold me this flour he told me it was Tea Rose Flour manufactured by the Steelville Milling Company, Steeleville, Illinois. Neither he -or Mr. Metcalf ever told me or represented to me in any manner that this Tea Rose flour was manufactured by the Hanover-Star Milling Company, but to the contrary that it was Tea Rose Flour made by the Steelville Milling Company, Steeleville, Illinois.

PINKNEY HUSTON.

Subscribed and sworn to before me this 5th day of April, 1912.

J. R. CLEPPER, *J. P.*

Filed 11 day of April, 1912, at 9 o'clock A. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of R. Ollinsky.

Personally appeared before me, W. H. Seale, a Notary Public, in and for Butler County, in the State of Alabama, R. Ollinsky, who being duly sworn, *and* on oath deposeth and saith that on the 4th day of March, 1912, he purchased from D. D. Metcalf one barrel of Tea Rose flour manufactured by the Steelville Milling Company, of Steeleville, Illinois, and that this flour was purchased through D. D. Metcalf. At the time this flour was sold me he told me it was Tea Rose flour, and neither he -or any one ever told me or represented to me in any manner that it was manufactured by the Hanover-Star Milling Company.

R. OLLINSKY.

58 Subscribed and sworn to before me this 10th day of April, 1912.

[SEAL.]

W. H. SEALE,
A Notary Public.

Filed 11 day of April, 1912, at 9 o'clock A. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of Rhodes Mill Mercantile Co.

Personally appeared before me E. P. Rigsby, N. P. and ex-Off. J. P., in and for Butler County, in the State of Alabama, R. W. Johnson, Secretary of the Rhodes Mill Mercantile Company, who being duly sworn on oath deposeth, and saith that on the 26th day of Feb., 1912, they purchased from D. D. Metcalf, 10 barrels of Tea Rose flour manufactured by the Steelville Milling Company, of Steeleville, Illinois, and that this flour was purchased through Mr. H. Hubert May, who was salesman for D. D. Metcalf. Neither Mr. May -or Mr. Metcalf ever told us or represented in any manner that this flour was manufactured by the Hanover-Star Milling Company.

R. W. JOHNSON.

Subscribed and sworn to before me this 6th day of April, 1912.
E. P. RIGSBY,
N. P. & ex-Off. J. P.

Filed 11 day of April, 1912, at 9 o'clock A. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

59 *Affidavit of J. R. Smith.*

BUTLER COUNTY,
State of Alabama:

Know all men by these presents, that the following statement is correct,

That Hubert H. May, a salesman for D. D. Metcalf, of Greenville, Ala., sold to me 8 bbls. of Tea Rose Flour manufactured by Steelville Milling Co., of Steeleville, Ill., on — day of Feb., 1912. Neither Hubert H. May nor D. D. Metcalf ever represented this flour to be Tea Rose manufactured by Hanover Star Milling Co. of —. But to the contrary that it was Tea Rose manufactured by Steelville Milling Co., of Steeleville, Ill.

(Signed) J. R. SMITH.

Signed and sealed in my presence this the 9th day of April, 1912.

E. D. ESPY,
Notary Public.

Filed 11 day of April, 1912, at 9 o'clock A. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Affidavit of Beasley & Peacock.

Personally appeared before me, W. B. Northcutt, a Justice of the peace in and for *the* — County, in the State of Alabama, H. H. Beasley, who being duly sworn, on oath *dis*poseth and saith that on the 5th day of March, 1912, he purchased from D. D. Metcalf ten barrels of Tea Rose Flour manufactured by the Steeleville Milling Company of Steeleville Illinois, and that this flour was purchased through H. Hubert May, who was salesman for D. D. Metcalf. At the time Mr. May sold me this flour he told me that it was Tea Rose flour manufactured by the Steeleville Milling Company, Steeleville, Illinois. Neither he -or Mr. Metcalf ever told me or represented to me in any manner that this Tea Rose
60 Flour was manufactured by the Hanover-Star Milling Company, but to the contrary that it was Tea Rose flour manufactured by the Steelville Milling Company, Steeleville, Illinois.

H. H. BEASLEY.

Subscribed and sworn to before me this 5th day of April, 1912.

W. B. NORTHCUTT,
Justice of the Peace.

Filed 11 day of April, 1912, at 9 o'clock A. M.

HARVEY E. JONES, *Clerk.*
By HARRY PORTER, *Deputy.*

Affidavit of Louis Phillips.

THE STATE OF ILLINOIS,
County of Clinton, ss:

Louis Phillips after being duly sworn deposes and says, that he is a resident of Germantown, Clinton County, Illinois, that he has been and is now the Head Miller of the Hanover Star Milling Co., of Germantown, Illinois, a corporation incorporated under the Laws of the State of Illinois, that he has been with the said Hanover Star Milling Co., as such Head Miller continually since 1884. That the said Hanover Star Milling Co. had an established market for a flour branded Tea Rose several years before a certain Herman Gilster of the Steeleville Milling Co., of Steeleville, Illinois, came to Germantown, Illinois, in 1905, endeavoring to purchase the Hanover Star Milling Co.'s Tea Rose Brand. That said Tea Rose brand has been used continuously by the Hanover Star Milling Co. positively since the year 1893, and I am under the impression that we had adopted said Tea Rose brand *on* or before the year 1888. That the quality of the flour branded Tea Rose has been continually maintained as well as the design of the brand and label.

LOUIS PHILLIPS.

Sworn to and subscribed before the undersigned Notary
61 Public of Germantown, Clinton County, State of Illinois, this 8th day of April, 1912.

ARNOLD B. MICHELS,
[SEAL.] *N. P. for Clinton County.*

My commission expires Aug. 25, 1913.

Filed 12 day of April, 1912, at 3:15 o'clock P. M.

HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Affidavit of Henry Schurmann.

THE STATE OF ILLINOIS,
County of Clinton:

Before me, Arnold B. Michels, a Notary Public in and for said County and State, personally appeared this day Henry Schurman, who being by me first duly sworn to speak the truth, the whole truth and nothing but the truth, on his oath, deposes and says:

That he is president of the Hanover Star Milling Company, of Germantown, Illinois, and as such president, received in the regular course of the United States mail, on, to wit, the 11th day of May, 1912, the following letter and notice:

"Whitnel, Browning & Gillespie,
Attorneys at Law,
Suite 505-511 Cahokia Bldg.,
East St. Louis, Ill.

L. O. Whitnel
H. L. Browning
Thos. E. Gillespie

Telephones: Bell, East 630; Kinlock, St. Clair, 357.

May 9, 1912.

The Allen and Wheeler Company, Troy, Ohio.

GENTLEMEN: I am enclosing you herewith a notice which I would ask you to please have copied on your letter heads and forward it by first mail to the Hanover Star Milling Company, at Germantown, Ill.

I have employed the firm of Whitnel, Browning & Gilles-
62 pie of East St. Louis, Ill., and J. Fred Gilster of Chester, Illinois, to undertake to enjoin the Hanover Star Milling Company from the further use of the trade mark "Tea Rose," and they are preparing a bill for the injunction and for an accounting of profits and are using your name as the complainants in the case, in accordance with your several letters authorizing us to do so, and we are willing to stand the costs and expenses of the suit. You will receive by mail within a few days the bill for injunction which I

trust you will execute at your earliest convenience and return to my attorneys. Any courtesies which you may show the aforesaid attorneys will be appreciated by us.

Yours respectfully,

(Signed) STEELEVILLE MILLING CO.,
(Signed) By ALBERT H. GILSTER, *Pres.*

Dic. G.

Date, —— ——.

Hanover Star Milling Company, Germantown, Ill.

GENTLEMEN: You are hereby notified that we, The Allen and Wheeler Company of Troy, Ohio, adopted, appropriated and used the words "Tea Rose" as a brand and trade mark for our flour since 1872 and probably prior thereto. We are therefore the owners of that Common Law Trade Mark, and as such we hereby notify you to immediately desist and cease from the use of said words "Tea Rose" as a name or brand of your Flour.

—— ——.

Affiant further states that the above is a true, correct and verbatim copy of the letter and notice thereto attached, which he received, and that said letter was so signed by the Steeleville Milling Company by Albert H. Gilster, President.

Affiant states that he is informed and believes, and therefore states, that the Steeleville Milling Company has attempted to induce the firm of Allen & Wheeler to begin an injunction suit against the Hanover Star Milling Company and thereby interfere with the sale, by the Hanover Star Milling Company, of "Tea Rose" flour, and for the purpose of embarrassing the Hanover Star Mill-
63 ing Company in its suit in this Court against D. D. Metcalf.

HENRY SCHURMANN.

Sworn to and subscribed before me, by the said Henry Schurmann on this the 25 day of May, 1912.

[SEAL.] ARNOLD B. MICHELS,
Notary Public, Clinton Co., Ill.

My Commission expires Aug. 25th, 1913.

Filed June 8th, 1912, at 11 A. M.
HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Replication.

And now comes Hanover Star Milling Company, plaintiff in the above cause, and replying to the answer filed herein, says: That saving and reserving all manner of exceptions to the insufficiency of the answer for replication thereto doth say that its Bill is true and sufficient as averred, and that it is ready to prove it, and that

the answer of the defendant is untrue and insufficient. Wherefore, plaintiff prays relief as in its original bill.

CLARKSON & MORRISETTE,
LONDON & FITTS,
Solicitors for Complainant.

Received by mail and filed 31 day of July, 1912, at 1:30 o'clock P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

64 *Order Granting Temporay Injunction.*

Whereas in the above entitled cause the complainant had heretofore filed its bill of complaint and had obtained on the affidavits therewith presented a restraining order against the said respondent, and has duly served notice of its application for issuance of a preliminary writ of injunction against the said respondent as prayed for in said bill of complaint, and whereas said cause was set down for hearing before the Honorable Thomas G. Jones, Judge of the Distirct Court of the United States for the Northern Division of the Middle District of Alabama, on the 26th day of March, 1912, and the parties complainant and respondent afterwards appearing by their respective solicitors, and the said Bill of Complaint having been presented and read to the Court, and the affidavits on behalf of the Complainant supporting the same, together with the affidavits presented on behalf of the Respondent upon said application, and the Court having read the briefs of counsel herein, and the cause having been submitted to the Court, the same is by the Court taken under advisement.

And now again on this 30th day of December, 1912, the Court having fully considered the matters involved herein, it is found that cause exists for the granting of a writ of injunction pending the final hearing of this cause, as prayed for and that irreparable injury will result to complainant if preliminary injunction does not issue pending the final hearing of the cause.

It is therefore ordered, decreed and adjudged by the Court that the said Respondent, D. D. Metcalfe, his agents, servants and all corporations, persons or partnerships doing or transacting business thro' or under him, or by his order, be enjoined and restrained from the further sale or offering or advertising for sale of any flour manufactured by the Steelville Milling Company, or any person, firm or corporation other than the Hanover Star Milling Company, of any flour labelled "Tea Rose," at Greenville, Alabama, or at any place whatsoever, in the Middle District of Alabama, until the further order of this Court in the premises.

65 The Complainant having been required to furnish a good and sufficient injunction bond, duly conditioned in the penal sum of $1,000.00, with good and sufficient surety to be approved by the Court, and such bond having been furnished by Complainant and approved by the Court, it is thereupon ordered, ad-

judged and decreed that this decree and order shall take effect only upon the issuance of the writ of injunction in conformity therewith.

THOS. G. JONES,
Judge, &c.

Filed 30th day of December, 1912, at 2 o'clock P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Injunction Bond.

Know All Men by These Presents that the Hanover Star Milling Company, a Corporation, as Principal, and Alabama Fidelity & Casualty Company, as Surety, are held and firmly bound unto D. D. Metcalf in the sum of $1,000, One Thousand Dollars, to the payment of which they bind themselves each for itself, its successors, heirs, executors and administrators firmly by these presents.

Sealed with their respective seals and dated this the 17th day of December, 1912.

The condition of the above obligation is such that whereas the said Hanover Star Milling Company, a corporation and a citizen of the State of Illinois, having filed on the Chancery side of the District Court of the United States for the Northern Division of the Middle District of Alabama, a bill for an injunction in the above entitled cause, and has obtained an order granting a temporary injunction as prayed for in said Bill of Complaint from said Court; Now if the said Hanover Star Milling Company shall abide the decision of said Court and pay all moneys and costs which shall be adjudged against it in case said injunction shall be dissolved, then
66 these presents shall be void, otherwise to remain in full force.

HANOVER STAR MILLING COMPANY,
By HARRY N. EDDINS, *General Representative.*
[SEAL.] ALABAMA FIDELITY & CASUALTY CO.
H. C. FORBES, *Attorney in Fact.*
J. W. KELLY, *Secretary.*

Filed 30th day of December, 1912, at 2 o'clock P. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Temporary Injunction.

The United States of America to R. D. Metcalfe, his agents, servants and all persons doing business thro' or under him or by his order:

Whereas the Hanover Star Milling Company, a Corporation, had filed in the District Court of the United States for the Northern Division of the Middle District of Alabama, on the Chancery side thereof, its certain bill of complaint against you, the said D. D. Metcalfe, Respondent in said cause, touching the matters and things

set forth in said bill of complaint, and that your actions and doings in the premises are contrary to equity and good conscience and

Whereas, an order was entered by this Court on towit, the 30th day of December, 1912, on the hearing of the bill of complaint, affidavits in support of the said bill and affidavits on behalf of the Respondent upon said liquidation, and after due notice to said Respondent allowing an injunction as prayed in said bill of complaint;

Now, Therefore, we having regard to the matters in said bill contained do hereby command and strictly enjoin you, the said D. D. Metcalfe, your agents and servants, and all persons, corporations and partnerships doing business thro' or under you or by your
67 order, and each and every one of you, to desist from the further sale or offering or advertising for sale of any flour manufactured by the Steelville Milling Company, or any person, firm or corporation other than the Hanover Star Milling Company, of any flour labelled "Tea Rose" at Greenville, Alabama, until the further order of this Court in the premises.

Witness the Honorable Thomas G. Jones, Judge of the District Court for the United States for the Northern Division of the Middle District of Alabama, at Montgomery, Alabama, in said District, on this the 30th day of December, 1912.

HARVEY E. JONES, *Clerk.*

Received in Office, Dec., 31st, 1912.

B. E. WALKER,
U. S. Marshal.

Executed by handing a copy of this writ to D. D. Metcalfe at Greenville, Ala., Butler County, this 2nd day of Jan. 1913.

B. E. WALKER,
U. S. Marshal,
By F. M. SHEEHAN, *Deputy.*

Filed 30th day of December, 1912, at 2 P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Petition for Appeal.

D. D. Metcalf, defendant in the above entitled cause, believing himself aggrieved by the order of the Court entered in the above entitled cause on or about the 30th day of December, 1912, granting the temporary injunction against him, does hereby appeal from said order to the United States Circuit Court of Appeals for the Fifth Circuit, for the reason specified in the assignment of errors which is filed herewith, and prays that his appeal may be allowed and a citation be directed to the above named complainant, the Hanover Star Milling Company, a corporation, commanding it to appear before said United States Circuit Court of Appeals for the Fifth Circuit to do and receive what may appertain to justice to be

done in the premises, and that a transcript of the record, pro-
68 ceedings, papers and exhibits on which said order was made, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Fifth Circuit; that said temporary or preliminary injunction provided for in said order and decree be stayed or suspended pending this appeal, and further prays and here tenders bond in such sum as the Court may require for that purpose; that the proper order touching the security to be required of him to perfect his appeal and effect said stay of the said injunction pending the appeal to be made.

EDWARD E. LONGAN,
J. FRED GILSTER,
LANE & LANE,
C. F. WINKLER,
Solicitors and Counsel for Defendant.

Filed 7 day of January, 1913, at 4 'clock P. M.

HARVEY E. JONES, *Clerk*,
By HARRY PORTER, *Deputy*.

Assignment of Errors.

D. D. Metcalf, defendant in the above entitled cause, conceiving himself aggrieved by the order granting a temporary injunction herein, entered on the 30th day of December, 1912, now appears by his solicitors and counsel, and presents with the accompanying petition for appeal from said order, the following assignment of errors:

First. The Court erred in granting a temporary injunction herein against this defendant.

Second. The Court erred in finding (as evidenced by a letter dated October 16th, 1912, written by the Court to the Counsel for the respective parties) that the evidence presents at least a case of unfair competition.

Third. The Court erred in holding (as evidenced by the letter above referred to) that the complainant is entitled to a preliminary injunction.

Fourth. The Court erred in not denying complainant's
69 motion or application for temporary injunction or in not sustaining the return of this defendant to the order to show cause why an injunction should not be issued against him.

Fifth. The Court erred in granting a restraining order against this defendant;

Sixth. The Court erred in granting a temporary injunction against said defendant on the unadjudicated trade-mark "Tea Rose";

Seventh. The Court erred in not holding or finding that long prior to any use of the trade-mark "Tea Rose" by the complainant, said trade-mark had been adopted and used by Allen & Wheeler, of Troy, Ohio;

Eighth. The Court erred in not holding that the complainant was not the owner, nor had any exclusive right to the use of the words "Tea Rose" as a trade mark for flour;

Ninth. The Court erred in not refusing a temporary injunction against this defendant on the ground of laches alone;

Tenth. The Court erred in finding that any cause exists for the granting of a preliminary injunction;

Eleventh. The Court erred in not denying complainant's motion or application for preliminary injunction;

Twelfth. The Court erred in that it did not deny complainant's motion or application for preliminary injunction on the ground that complainant was not the owner of the trade-mark "Tea Rose";

Thirteenth. The Court erred in that it did not find that the defendant had not invaded any property right of the complainant, nor had unfairly competed with complainant;

Fourteenth. The Court erred in that it did not find that long prior to the first use of the words "Tea Rose" by the complainant, and as early as 1872, said words "Tea Rose" had been adopted and used as a trade-mark for flour by the co-partnership of
70 Allen & Wheeler, and that said firm sold flour under this brand at Cincinnati, Ohio, Pittsburgh, Pennsylvania, New York, New York, and Boston, Massachusetts.

Fifteenth. The Court erred in that it did not find that defendant had not infringed on any lawful rights of complainant, nor that a single customer had ever been deceived into buying defendant's flour made by the Steeleville Milling Company, for the Complainant's flour;

Sixteenth. The Court erred in granting a preliminary injunction against this defendant enjoining and restraining him from the further sale or offering or advertising for sale of any flour manufactured by the Steeleville Milling Company, or any person, firm or corporation other than the Hanover Star Milling Company, of any flour labelled "Tea Rose," at Greenville, Alabama, or at any place whatsoever in the Middle District of Alabama, until the further order of this Court in the premises.

Seventeenth. The Court erred in that it did not hold that the complainant was not the first to adopt and use the words "Tea Rose" as a trade-mark for flour—was not the owner thereof, and had no right to exclude others from the use thereof.

Wherefore defendant prays that the said order and decree be reversed and the District Court be directed to withhold the granting of any injunction against this defendant until the final hearing of this cause and that the Court of Appeals will render a proper decree on the record.

EDWARD E. LONGAN,
J. FRED GILSTER,
LANE & LANE,
C. F. WINKLER,
Solicitors and Counsel for Defendant.

Filed 7 day of January, 1913, at 4:30 P. M.
HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

71

Order Allowing Appeal and Staying Injunction.

On motion of J. Fred Gilster, C. F. Winkler, Lane & Lane and Edward E. Longan, Solicitors and counsel for defendant,

It is ordered that an appeal to the United States Circuit Court of Appeals for the Fifth Circuit from the order and decree heretofore filed and entered herein on the 30th day of December, 1912, be and the same is hereby allowed, and that a certified transcript of the record, testimony, affidavits, exhibits and papers and all proceedings herein be forthwith transmitted to the said United States Circuit Court of Appeals for the Fifth Circuit;

And it is further ordered that the injunction provided for by said order and decree be stayed or suspended pending the appeal of this cause.

It is further ordered that defendant give bond to satisfy the costs on appeal and to satisfy and indemnify the complainant against any loss or damage which it may sustain as the result of the staying of the injunction in this cause in the sum of Four Thousand Dollars.

THOS. G. JONES,
U. S. District Judge.

Filed 8 day of January, 1913, at 9 o'clock A. M.
HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Supersedeas Bond.

Know All Men by These Presents, That we, D. D. Metcalf, as principal, and Alabama Fidelity & Casualty Co., of Montgomery, Alabama, as sureties, are held and firmly bound unto Hanover Star Milling Co., a corporation, in the sum of Four Thousand Dollars ($4,000), to be paid to the Hanover Star Milling Company, a corporation, their successors and assigns. To which payment well and truly to be made we bind ourselves and each of us jointly and severally, and our, and each of our successors and assigns firmly by these presents,

72 Sealed with our seals and dated this the 7 day of January, 1913.

Whereas the above named D. D. Metcalf has prosecuted an appeal to the United States Circuit Court of Appeals, for the Fifth Circuit, to reverse the decree rendered in the above entitled suit by the District Court of the United States for the Northern Division of the Middle District of Alabama.

Now, therefore, the condition of the above obligation is such that

if the said D. D. Metcalf shall prosecute his appeal to effect and answer all damages and costs if he fails to make his plea good then the above obligation to be void, otherwise to be and remain in full force and effect.

D. D. METCALF [L. S.]
[SEAL.] ALABAMA FIDELITY & CASUALTY CO. [L. S.]
By H. C. FORBES, *Attorney in Fact.*

Taken and approved and ordered filed this the 8th day of January, 1913.

THOS. G. JONES, *Judge.*

Filed 8 day of January, 1913, at 10 A. M.
HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Citation.

United States of America to Hanover Star Milling Company, Greeting:

You are hereby notified that in a certain case in equity, in the United States District Court in and for the Northern Division of the Middle District of Alabama, wherein Hanover Star Milling Company, a body corporate organized under the laws of and resident of the State of Illinois, is complainant and D. D. Metcalf, a citizen of the State of Alabama, is defendant, an appeal has been allowed the defendant therein to the United States Circuit Court of Appeals for the Fifth Circuit. You are hereby cited and admonished to be and appear in said Court within thirty days after the date of this citation to show cause, if any there be, why the
73 order and decree appealed from should not be corrected and speedy justice done the parties in that behalf.

Witness the Honorable Thomas G. Jones, Judge of the United States District Court for the Northern Division of the Middle District of Alabama, this the 8th day of January, A. D. 1913.

THOS. G. JONES,
United States District Judge.

Filed 8th day of January, 1913, at 4 o'clock P. M.
HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

Waiver of Service of Citation.

We, Clarkson & Morrisette, and Henry Fitts, Attorneys of record for Hanover Star Milling Company, a body corporate, organized under the laws of and resident of the State of Illinois, appellee, do hereby waive service of citation in appeal in this cause.

CLARKSON & MORRISETTE,
HENRY FITTS,
Attorneys for Appellee.

Filed 8 day of January, 1913, at 4 o'clock P. M.

HARVEY E. JONES, *Clerk,*
By HARRY PORTER, *Deputy.*

Order Directing Clerk to Forward Original Exhibits to the United States Circuit Court of Appeals, Fifth Circuit.

Whereas, an appeal from the decree rendered by this Court in this cause has been allowed the defendant D. D. Metcalf in the above entitled cause, to the United States Circuit Court of Appeals for the Fifth Judicial Circuit,

And Whereas, it appearing to the Court that the original exhibits in the above entitled cause, consisting of flour sacks, photo-
74 graphic copies, etc., both for the complainant and the defendant, are bulky and difficult to copy—

It is therefore ordered, adjudged and decreed that the Clerk of this Court send to the Clerk of the United States Circuit Court of Appeals for the Fifth Circuit all of the original Exhibits in the above entitled cause.

Done at Montgomery, Ala., this the 24th day of January, 1913.

THOS. G. JONES,
United States District Judge.

Filed 24 day of January, 1913, at 4 o'clock P. M.

HARVEY E. JONES, *Clerk,*
By ELLEN W. JACKSON, *Deputy.*

UNITED STATES OF AMERICA,
Middle District of Alabama:

I, Harvey E. Jones, Clerk of the United States District Court for the Middle District of Alabama, hereby certify that the foregoing pages numbered from one (1) to eighty-seven (87), inclusive, contain a full, true and correct copy of the record and proceedings in the case of Hanover Star Milling Company vs. D. D. Metcalf, No. 178, in equity, as the same remain on file and of record in my office as such Clerk.

Witness my hand and the seal of said Court at Montgomery, Alabama, this the 24th day of January, 1913.

[SEAL.] HARVEY E. JONES,
Clerk U. S. District Court, Middle District of Alabama.

75 That thereafter, the following proceedings were had in said cause in the United States Circuit Court of Appeals for the Fifth Circuit, viz:

Argument and Submission.

Extract from the Minutes of March 19th, 1913.

No. 2476.

D. D. METCALF
versus
HANOVER STAR MILLING COMPANY.

On this day this cause was called, and, after argument by Edward E. Longan, Esq., and J. Fred Gilster, Esq., for Appellant, and Henry Fitts, Esq., and E. L. Clarkson, Esq., for Appellees, was submitted to the Court.

Opinion of the Court.

Filed April 8th, 1913.

In the United States Circuit Court of Appeals, Fifth Circuit

76 No. 2476.

D. D. METCALF
v.
HANOVER STAR MILLING COMPANY.

Appeal from the District Court of the United States for the Middle District of Alabama.

Before Pardee and Shelby, Circuit Judges, and Sheppard, District Judge.

Edward Everett Longan, J. Fred Gilster, Lane & Lane, and C. F. Winkler, for Appellant.
Clarkson & Morrisette, and London & Fitts, for Appellee.

SHEPPARD, District Judge, for the Court:

This is an appeal from the District Court of the Middle District of Alabama from an order allowing a temporary injunction against the plaintiff in error, hereafter designated, defendant, by the Hanover Star Milling Company, a corporation of Germantown,
77 Illinois, hereafter referred to as plaintiff, for infringement and unfair competition under plaintiff's alleged trademark "Tea Rose."

The bill, in so far as it is necessary to consider to determine the merits of the controversy, charges substantially that the plaintiff, Hanover Star Milling Company, for twenty-seven years had been engaged at Germantown, Illinois, in the manufacture of a popular grade of flour called Tea Rose; that for twelve years this flour had been upon the market in Alabama in sacks or bags under the distinctive label or stencil brand similar to the following cut:

Hanover Star
Milling Co.
(Design)
Tea Rose
Special Patent
Flour
Germantown, Ill.
Tea Rose.

(Design of green rose with yellow leaves, design turned to right, and consists of one large rose, a half open rose and small bud, etc.)

78 That by maintaining a high grade of flour under this brand, and by extensive advertising, plaintiff enjoyed a lucrative trade in its Tea Rose flour, and by reason of the reputation, of the Tea Rose was enabled to sell to the trade in Alabama, Georgia, and Florida, large quantities of other flour of its manufacture; that defendant Metcalf had invaded its territory in Alabama and was offering and selling in Butler County, Alabama, a product of the Steeleville Milling Company located at Steeleville, Illinois, a flour different from that made and sold by plaintiff in packages suostantially identical with those used by plaintiff in marketing its Tea Rose flour, the similarity of brand and stencil picture being shown by appropriate exhibits to the bill, which disclose such an imitation or dressing of the package as might well mislead the trade of the Hanover Star Milling Company's product, named Tea Rose; that Metcalf by the use of such wrappings
79 and by his misrepresentations that the Steeleville article is the original Tea Rose flour, constitutes unfair competition against plaintiff, wherefore, plaintiff seeks relief in equity.

Defendant Metcalf answered the bill and denied specifically the allegations of deception and misrepresentations in connection with the sale in Butler County, Alabama, of the Steeleville article of flour called Tea Rose; that he had sold and delivered as a merchant in business at Greenville, Alabama, forty barrels of the manufacture of the Steeleville Milling Company at Greenville, Alabama, in packages stamped as here shown:

Steeleville
Roller Mills
(Design) #
Tea Rose
Guaranteed by
Steeleville Milling Co.
under Food & Drugs Act,
June 30, 1906.
Serial No. 15304.
Steeleville Milling Co.
Steeleville, Ills.
24 Lbs. Tea Rose, Flour
Bemis, St. Louis.

(Design of yellow rose with green leaves, the design turned to the left, and consists of one large rose, a half open rose and a small bud, etc.)

80 That it was not represented as the Hanover Star Milling Company's flour and that no deceit was practiced in the sale thereof; further answering, defendant denied that plaintiff was the first to appropriate the name Tea Rose in the manufacture of flour; that the name Tea Rose had been appropriated as a brand of flour by the firm of Allen & Wheeler of Troy, Ohio, long before plaintiff's use, and as early as 1872; that the Steeleville Milling Company has used the Tea Rose brand on flour for more than sixteen years, and that for six years prior to plaintiff's suit the Steeleville Milling Company had been selling with plaintiff's knowledge to the trade in portions of Mississippi and parts of Alabama flour in packages stamped with the cut above indicated.

The cause was submitted on bill, answer, and exhibits; and thereupon, a temporary restraining order was granted, from which
81 defendant prosecuted his appeal to this Court on several grounds of error which may be considered for the purpose of this review in one assignment,—that the Court erred in not denying the preliminary injunction on the ground that the plaintiff was not the owner of the trade-mark Tea Rose, and that defendant had not engaged in unfair competition.

The question mainly presented is unfair competition, but in the light of the authorities, infringement is inseparably involved, and the right to protection against the latter depends upon the antecedent fact of first and exclusive use. Infringement is the wrongful copying and sending forth of an article well calculated to be taken for one already established in trade, and is regarded in the law as analogous to a trespass. Unfair competition consists in placing on the established trade of another an article or commodity
82 dressed so as to be very like the other and "palming off" the imitation as the original.

This leads us necessarily to ascertain what constitutes one's right in a trademark which the law undertakes to protect. Primarily, first invention, use or adoption assures to the originator or owner protection from infringement. Prior adoption and original exclusive use entitles the first appropriator to the common-law protection against similar and deceptive dressing coupled with fraudulent misrepresentation. Hopkins Trademarks, 2d Edition, Sec. 30; Lawrence Mfg. Co., vs. Tennessee Mfg. Co., 138 U. S. 537.

It does not comport with the purpose of the law to put any barriers in the way of commercial intercourse or to interfere with fair competition. It is to the best interests of society that commerce be left to the adjustment of the law of supply and demand. There are, however, exclusive property rights in trademarks and
83 names which may have been adopted by one to indicate his ownership which are recognized and protected by the common-law, to the extent that another will not be allowed to appropriate the name, mark or symbol to enable the imitator to palm off on the established trade of the originator a different article or commodity though it might be in every respect equal in quality to the original mark or brand,—such imposition constitu-es what is tech-

nically termed unfair competition, which the law undertakes to prevent. Trade-mark Cases—100 U. S. 82.

To invoke the jurisdiction of a court of equity to prevent infringement and unfair competition by the use of a similar trademark by another, it is incumbent upon the complainant to show that he has a property right in the mark or thing which indicates the ownership, or origin, of the article; and that its use has been fraudulently invaded by another. Columbia Mill Co., vs.
84 Alcorn—150 U. S. 450; 149 Ala. 125.

The property right in a trademark is acquired chiefly as we shall see by prior adoption and exclusive use of the mark or symbol relied upon to distinguish the proprietor's ownership. The exclusive right to the use of a trademark rests not so much on priority of invention, but upon such use as to indicate the origin of the plaintiff's goods, and must be early and separate enough for that purpose. Where long use is clearly shown, the mere fact that the owner has permitted the limited use by another, if such use was not calculated to mislead, will not defeat the owner's right to protection.

On the question of first appropriation and exclusive use, which we have seen are the insignia of plaintiff's title, let us advert briefly to the bill and the evidence in support of its allegations on this point. The bill avers that the plaintiff for twenty-seven
85 years had given the name Tea Rose to a flour manufactured by it, but nowhere does it state definitely the time of its first use, or when it was adopted as a mark of distinction, or when its exclusive use began, except the general allegation that plaintiff had marketed flour in Alabama for twelve years under the distinctive wrappings indicated in the cut, in which Tea Rose occurs in the ellipse after the name of the manufacturer. It is shown by several depositions in support of the bill that plaintiff had established quite an extensive trade in the particular brand of flour in Alabama and parts of Georgia, Florida, and Mississippi, over a period of from five to seven years; that it had encountered no competition in this territory from defendant until about two years ago it discovered a small shipment of defendant's brand at Tupelo, Mississippi,
86 and later a shipment at West Point, Mississippi, to the time in February, 1912, when it is alleged Metcalf received the carload at Greenville, Alabama, which precipitated the present litigation. Opposed to this array of fact by the plaintiff the defendant's showing is that in 1899 to 1903 inclusive it sold at divers points in Alabama and Mississippi carload lots of its Tea Rose flour under the distinctive wrappings indicated by the Steeleville Milling Company's cut, and that for sixteen years flour bearing the identical trademark exemplified in defendant's cut had been sold by defendant in carloads in the States of Illinois, Tennessee, Louisiana, Mississippi, and Arkansas, including one lot in Alabama as long ago as 1899. It is further shown by defendant's exhibits that the words Tea Rose label was first used as a trademark and stamped on flour manufactured by Allen & Wheeler of Troy, Ohio, as early as
87 1872, and had been continuously used by said firm and its successors up to the time of this suit.

It also was shown by the records of a bag factory of H. & L. Bag Company of St. Louis, which makes bags for both plaintiff and defendant, that the orders of the Steeleville Milling Company for sacks labelled with the print containing Tea Rose mark identical with that appearing in defendant's cut antedated the orders of the plaintiff's Tea Rose print fully three years.

From this summary of the evidence, at most, it does not appear that there is any preponderance favoring the contention that the plaintiff was the first appropriator of the trademark Tea Rose, or that he had the exclusive right to the use of the label in the territory to which it sets up exclusive title,—neither on the ground of first or prior appropriation, because by a clear preponderance of the evidence the name Tea Rose had been adopted as a
88 brand of flour many years previous to plaintiff's use of the phrase for same purpose; nor on account of abandonment by the first claimant or such intermittent use of the trademark by the first owner as would justify the adoption by another on that ground. On the contrary, the proofs show that defendant was for 16 years consecutively supplying an extensive trade under that particular brand in Illinois, Tennessee, Indiana, Arkansas and Mississippi, with occasional shipments into Alabama. During most of this period bags stamped with the distinctive labels of both plaintiff and defendant were turned out by the same factory. The evidence in our opinion points indubiously to Allen & Parker as having first adopted the Tea Rose brand for their flour in 1872. Whether this use was so general or continuous as to exclude any other appropriation or entitle them to protection, the evidence shows conclusively that the use by the Steeleville Milling
89 Company of this brand commencing in 1895 was so extensive and continuous throughout a large territory as in our judgment would wholly exclude the claim of the Hanover Star Milling Company to either act of first appropriator or exclusive use in any of the territory from which it seeks to expel defendant.

Abandonment as we have seen must be supported by a clear intention of the owner to discontinue the use of the trademark. The evidence does not show any purpose on the part of the defendant in our opinion to abandon the use of the Tea Rose in the territory generally occupied in its trade. Nor does the evidence support the right of the plaintiff on any theory of "transitory, spasmodic or inconsiderable" use by the defendant of the trademark in the territory by it previously occupied. Hopkins Trademarks, 2d Ed. 64; 26 Fed. 576; 123 Fed. 782; 61 Fed. 1008.

90 It appears to be well settled by authority that the first use of a trademark gives to the prior user the exclusive right to its use in trade to a commodity to which it is applied. George vs. Smith, 62 Fed. 830.

Nor is property in a trademark limited to its enjoyment by territorial bounds, but may be asserted and protected wherever the law affords a remedy for wrongs. Saxlehner vs. Eisner & Mendelson Co., 179 U. S. 19; Derringer vs. Plate, 29 Cal. 292.

The Steeleville Milling Company's first use and its extensive and

continuous use established by the evidence in the territory of its selection gave it the unqualified right to extend unhampered its trade in flour under the Tea Rose brand into any part of the United States, and that too without incurring the legal odium of unfair competition.

To entitle the plaintiff to protection against unfair competition in the dress of goods it should be clearly shown that he had
91 established the exclusive right by prior adoption to dress his goods in the manner claimed. Coats vs. Merrick Thread Co., 149 U. S. 562; Dietz vs. Horton Mfg. Co., 170 Fed. 865.

We have seen that before there can be any infringement of a trademark it should appear by a clear preponderance of the evidence that complainant was the first to appropriate the mark or symbol, and his exclusive use depends upon prior appropriation. The proofs show that Allen & Wheeler were the first to appropriate the Tea Rose brand as early as 1872, and that its use by the Steeleville Milling Company began in 1895, three years before the first order for sacks bearing that dress by the Hanover Star Milling Company. Columbia Mill Co., vs. Alcorn, Supra; Levy vs. Waitt, 56 Fed. 106.

In arriving at this conclusion, we have not overlooked the Baltimore Club Whiskey case (Carroll vs. McIlvaine, 171 Fed. 125), decided by Judge Hough, and emphasized by counsel for
92 plaintiff. The distinguishing facts of that case and upon which the decision doubtless turned was the limited territory employed by the Baltimore vendors of the article called "Baltimore Club," which appears to have been confined to the City of Baltimore before it was "introduced" to the trade in New York. The liquid blend of the same name in New York, if it did not enjoy a name so ancient, was equally as popular and covered a more extensive territory, and while apparently the case did not turn on that point, the sounder reason for the decision may have been put on the fact, that while the original Carroll began to sell Baltimore Club not earlier than 1870, the original McIlvaine, the New York vendor, as ascertained by the learned Judge, "sold Baltimore Club whiskey and obtained a considerable market for same as early as 1868."

From the facts disclosed by the record and summarized in this opinion in the light of the authorities, we conclude that the
93 plaintiff had no exclusive right to Tea Rose as a trademark for flour anywhere, and that Metcalf by selling to his trade in Alabama the Tea Rose brand of the Steeleville Milling Company manufacture was not engaged in such unfair competition as would authorize the jurisdiction of a court of equity to prevent.

The restraining order, therefore, should be dissolved and the bill dismissed, and the order will be accordingly that the decree is reversed and the cause remanded with directions to dismiss the bill.

Judgment.

Extract from the Minutes of April 8th, 1913.

No. 2476.

D. D. METCALF
versus
HANOVER STAR MILLING COMPANY.

This cause came on to be heard on the transcript of the
94 record from the District Court of the United States for the Middle District of Alabama, and was argued by counsel;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that the decree of the said District Court, in this cause, be, and the same is hereby reversed, and the cause remanded to said District Court with directions to dismiss the bill;

It is further ordered, adjudged and decreed that the Appellee, Hanover Star Milling Company, be condemned to pay the costs of this cause in this Court, for which execution may be issued out of said District Court.

Application for Rehearing.

Filed April 28th, 1913.

United States Circuit Court of Appeals, Fifth Circuit.

95 No. 2476.

D. D. METCALF, Appellant,
vs.
HANOVER STAR MILLING COMPANY, Appellee.

Application for Rehearing.

Comes the Appellant, Hanover Star Milling Company, and moves the Court for a Rehearing of the reversal entered herein upon April 8th, 1913, and for a decree of affirmance and submits the following argument in support of this application viz:

The decree, (and opinion upon which it is based), is erroneous in this:

It makes the adoption of the name Tea Rose by Allen & Wheeler in a territory altogether remote from the trade territory developed by the Hanover people, destructive of their right to a valuable market, built up without interference with Allen & Wheeler, in ignorance of the fact that Allen & Wheeler had ever used such
96 a name,—and in absence of any showing that Allen & Wheeler had ever used or advertised the name anywhere

so as to identify it with Allen & Wheeler manufacture, or origination.

It ignores the rule that trade mark property is limited to the territory occupied by the trade which is incident to the mark.

Led on by initial errors just stated, it naturally magnifies the use of the words Tea Rose by the Steeleville Mill, far beyond the showing of such use made by the evidence or even claimed by the Bill.

It ignores the admitted fact that Steeleville sometimes used the name on one grade of flour and then on another, so that it never at any time stood an insignia for a definite or maintained quality, upon the most elementary considerations, an essential to any trade-mark right.

It faile to take note of the uncontroverted fact that such variant use, (first on one kind of flour and then on another), as
97 Steeleville made of the Tea-Rose name was in a territory different from that in which Hanover had built up a reputation for its flour.*

It fails to attach due force to the admitted fact that when Hanover began its extensive advertising the name Tea-Rose was unknown by either sales, advertisement or reputation, in any part of the territory selected for the propaganda.

Due regard is not given to the fact that the Greenville car load of Steeleville flour was shipped into a territory where Steelevile and Allen & Wheeler were unknown and the Hanover product was holding exclusive sway; that the Steeleville flour put up in Tea-Rose sacks was a lower priced flour than it had theretofore sold under that name; showing a change made to pirate Hanover reputation.

98 It is not appreciative of the fact that in Greenville, (and the balance of Hanover's territory), it had a valuable trade, built upon the combination of sustained merit and publicity; that in that territory Steeleville had no trade, no reputation and had done no advertising; that there Tea-Rose stood for one manufacturer's product only, and that manufacturer was neither Steeleville nor Allen & Wheeler.

It attaches importance to the disclaimer of Steeleville that it did not intend to deceive and made no actual deception; thus ignoring the universally accepted rule that similarity of names and packages are all sufficient evidence of fraud.

(Signed) CLARKSON & MORRISSETTE,
LONDON & FITTS,
HENRY FITTS,
Attorneys for Appellee.

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*Steeleville made only one sale in Alabama, and the few sales made in Mississippi, with the exception of isolated sales of high priced flour made in Tupelo and West Point, were not in that portion of the State developed by Hanover.

I, Henry Fitts of London & Fitts, of counsel for the Appellee, hereby certify that the foregoing application for rehearing
99 is well founded in point of law and is not interposed for the purpose of delay. I further certify that I have this day mailed a copy of the foregoing application to the counsel for the appellant, viz: Edward Everett Longan, Esq., St. Louis, Mo.; J. Fred Gilster, Esq., Chester, Ill.; and Messrs. Lane & Lane and C. F. Winkler, Esq., both of Greenville, Ala.

April 26, 1913.

(Signed) HENRY FITTS.

Order Denying Rehearing.

Extract from the Minutes of June 2nd, 1913.

No. 2476.

D. D. METCALF
versus
HANOVER STAR MILLING COMPANY.

Ordered that the petition for rehearing, filed in this cause, be and the same is hereby denied.

100 *Clerk's Certificate.*

UNITED STATES OF AMERICA:

United States Circuit Court of Appeals, Fifth Circuit.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the pages numbered from 75 to 99 next preceding this certificate contain full, true and complete copies of all the pleadings, record entries and proceedings, including the opinion of the United States Circuit Court of Appeals for the Fifth Circuit, in a certain cause in said Court, numbered 2476, wherein D. D. Metcalf is Appellant, and Hanover Star Milling Company is Appellee, as full, true and complete as the originals of the same now remain in my office.

I further certify that the pages of the printed record numbered from 1 to 74 are identical with the printed record upon
101 which said cause was heard and decided in the said Circuit Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of the said Circuit Court of Appeals, at my office in the City of New Orleans, Louisiana, in the Fifth Circuit, this 13th day of August, A. D. 1912.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals.

102 In the United States Circuit Court of Appeals for the Fifth Circuit.

No. 2476.

D. D. METCALF, Appellant,
versus
HANOVER STAR MILLING COMPANY, Appellee.

I, Frank H. Mortimer, Clerk of the United States Circuit Court of Appeals for the Fifth Circuit, do hereby certify that the transcript of the record of the proceedings of this Court in the within entitled case heretofore certified by me for filing in the Supreme Court of the United States was correct and complete as the same then appeared in this Court.

In pursuance of the command of the annexed writ of certiorari, I now hereby certify that on the 26th day of January, A. D. 1914, there was filed in my office a stipulation in the above entitled cause in the following words, to-wit:—

"In the Supreme Court of United States, October Term, 1913.

No. 740.

HANOVER STAR MILLING COMPANY, Petitioner,
v.
D. D. METCALF, Respondent.

Stipulation.

It is hereby stipulated that the record filed in this Court with the petition for writ of certiorari shall be taken as a return to
103 the writ.

This January 21st, 1914.

(Signed) HENRY FITTS,
EDGAR L. CLARKSON,
J. E. MORRISETTE,
HENRY FITTS,
Attorneys for Petitioner.

(Signed) E. E. LONGAN,
J. FRED GILSTER,
Attorneys for Respondent."

I further certify that the above is a true and correct copy of said stipulation and of the whole thereof.

In testimony whereof, I hereunto subscribe my name and affix the seal of the said United States Circuit Court of Appeals, at the

City of New Orleans, Louisiana, this 26th day of January, A. D. 1914.

[Seal United States Circuit Court of Appeals, Fifth Circuit.]

FRANK H. MORTIMER,
Clerk of the United States Circuit Court of Appeals for the Fifth Circuit.

104 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fifth Circuit, Greeting:

[Seal of the Supreme Court of the United States.]

Being informed that there is now pending before you a suit in which D. D. Metcalf is appellant, and Hanover Star Milling Company is appellee, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Middle District of Alabama, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United
105 States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the ninth day of January, in the year of our Lord one thousand nine hundred and fourteen.

JAMES D. MAHER,
Clerk of the Supreme Court of the United States.

106 [Endorsed:] File No. 23,891. Supreme Court of the United States. No. 740, October Term, 1913. Hanover Star Milling Company vs. D. D. Metcalf. Writ of Certiorari. 2476. U. S. Circuit Court of Appeals. Filed Jan. 13, 1914. Frank H. Mortimer, clerk.

107 [Endorsed:] 740/23891. No. 2476. United States Circuit Court of Appeals, for the Fifth Circuit. D. D. Metcalf, Appellant, vs. Hanover Star Milling Company, Appellee. Writ of certiorari and return thereto.

108 [Endorsed:] File No. 23,891. Supreme Court U. S., October term, 1913. Term No. 740. Hanover Star Milling Co., Petitioner, vs. D. D. Metcalf. Writ of certiorari and return. Filed January 29, 1914.